DOCKET

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No. 86-1879-CFX
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May 27, 1987

Title: National Treasury Employees Union, et al., Petitioners
v.
William Von Raab, Commissioner, United States Customs Service

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Williams,Lois G.

Counsel for respondent: Solicitor General

NOTE: App. for stay A-847

Entry	Date	Note	Proceedings and Orders
3	May 22 1987		Application for stay filed.
4	May 26 1987		DISTRIBUTED. May 28, 1987.
1	May 27 1987	G	Petition for writ of certiorari filed.
2	May 27 1987	D	Motion of petitioners to expedite consideration of the petition for a writ of certiorari filed.
5	May 27 1987		Response of the U. S. filed.
6	Jun 1 1987		The application for stay presented to White J., and by him referred to the Court is denied. Brennan, J.,
7	Jun 1 1987		would grant the application.
8	Jun 1 1987		DISTRIBUTED. June 4, 1987. (Motion of petitioners to expedite consideration. Also petition for certiorari).
9	Jun 8 1987		Motion of petitioners to expedite consideration of the petition for a writ of certiorari DENIED.
11	Jun 24 1987		Order extending time to file response to petition until July 27, 1987.
12	Jul 27 1987		Brief of respondent Von Raab, Commr. US Customs in opposition filed.
13	Jul 29 1987		DISTRIBUTED. September 28, 1987
14	Sep 8 1987	X	Reply brief of petitioners Natl. Treasury Employees Union, et al. filed.
16	Feb 22 1988		REDISTRIBUTED. February 26, 1988
17	Feb 23 1988	X	Supplemental brief of petitioners Natl. Treasury Employees Union, et al. filed.
18	Feb 29 1988		Petition GRANTED.
			**********
20	Mar 23 1988		Order extending time to file brief of petitioner on the merits until April 30, 1988.
21	Apr 20 1988		Order further extending time to file brief of petitioner on the merits until May 5, 1988.
22	May 4 1988		Brief amicus curiae of Coalition of California Utility Workers filed.
23	May 5 1988		Joint appendix filed.
24	May 5 1988		Brief of petitioners Natl. Treasury Employees Union, et al. filed.
25	May 5 1988		Brief amicus curiae of NJ State Lodge, Fraternal Order of Police filed.
26	May 5 1988		Brief amicus curiae of Fraternal Order of Police, Grand Lodge filed.

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Entry	Date	Note	Proceedings and Orders
27	May 5 1988		Brief amici curiae of AFL-CIO, et al. filed.
32	May 5 1988		Brief amici curiae of ACLU, et al. filed.
28	May 11 1988		Record filed.
		*	Certified copy of original record, proceedings and exhibits, box, received.
29	May 11 1988		Brief amicus curiae of Pacific Legal Foundation filed.
31	May 26 1988		Order extending time to file brief of respondent on the merits until June 18, 1988.
40	Jun 6 1988		This case is to be argued in tandem with No. 87-1555, James H. Burnley, IV, Secretary, Department of Transportation, et al. v. Railway Labor Executives' Association, et al.
34	Jun 16 1988		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
35	Jun 16 1988		Brief amici curiae of Pharchem, et al. filed.
33	Jun 17 1988		Brief amicus curiae of Equal Employment Advisory Council filed.
36	Jun 17 1988		Brief of respondent United States filed.
37	Jun 17 1988		Brief amicus curiae of California Employment Law Council filed.
38	Jun 17 1988		Brief amici curiae of Washington Legal Foundation, et al. filed.
39	Jun 18 1988		Brief amicus curiae of College of American Pathologists filed.
41	Aug 18 1988		CIRCULATED.
42	Aug 29 1988		Set for argument. Wednesday, November 2, 1988. (2nd case) (1 hr). Set in tamdem with 87-1555.
43	Sep 23 1988	D	Motion of petitioners for leave to file a reply brief, out-of-time filed.
44	Oct 3 1988		DISTRIBUTED. October 7, 1988. (Motion of petitioners for leave to file a reply brief out-of-time).
45	Oct 11 1988		Motion of petitioners for leave to file a reply brief, out-of-time DENIED.
46	Nov 2 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1879

FILED
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CLERK

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NATIONAL TREASURY EMPLOYEES UNION, and ARGENT ACOSTA, President, Chapter 168, National Treasury Employees Union,
Petitioners,

v.

WILLIAM VON RAAB, Commissioner, United States Customs Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in approving a drug testing program that requires employees to provide urine samples as a condition of promotion, without determining that the government was unable to meet its needs by observing the Fourth Amendment requisites of a warrant, probable cause, or at least some quantum of individualized suspicion.

2. Whether the Customs Service's urine testing program violates the Fourth Amendment by requiring all employees to undergo a body search for evidence of illegal drug use as a condition of obtaining promotions or job transfers, where:

A. The program was established despite the undisputed fact that existing, constitutionally sound, employment devices had produced a largely drug-free workforce; and

B. The program is ineffective to meet the government's interests in a safe, honest, and productive workforce, because an individual who uses illegal drugs can avoid detection by abstaining from use or adulterating his urine sample, and because no problem has been shown which necessitates new deterrent measures.

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NATIONAL TREASURY EMPLOYEES UNION, and
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WILLIAM VON RAAB, Commissioner, United
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals vacating the district court's permanent injunction (App., *infra*, 1a-27a) is not yet reported. The order of the court of appeals denying petitioners' motion for a stay of judgment pending application for a writ of certiorari (*id.* at 28a) is unreported. The opinion of the court of appeals denying the Customs Service's request for a stay pending appeal (*id.* at 29a-39a) is reported at 808 F.2d 1057. The district court's opinion (*id.* at 40a-62a) is published at 649 F. Supp. 380. The opinion of the district court denying

Customs' motion for a stay pending appeal (*id.* at 63a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1987. On May 12, 1987, the court of appeals denied petitioners' motion for a stay of judgment pending application for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1251(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. This case arose out of a suit brought by the National Treasury Employees Union (the exclusive bargaining representative of 9,000 employees of the United States Customs Service) and Argent Acosta (an NTEU Chapter President and Customs employee). The Union and Acosta sought an injunction on behalf of current Customs employees against implementation of Customs' newly created "Drug Screening Program." Customs' program applies to employees and outside applicants selected to receive promotions into certain "covered positions." [1] Under

[1] As the court below recognized, the range of positions covered under the program is extremely broad. App. *infra* at 3a. The general criteria are that the position "directly" involve drug interdiction and enforcement of "related" laws," or that the position require the incumbent to carry firearms, or, more generally, that the incumbent have access to "classified information." Plaintiffs' Exh. 1, p. 2. During this litigation, Customs had already identified

the program, in order to be placed in positions for which they have been selected, these individuals are required to produce a urine sample under the "close" observation of a government agent; the sample will then be chemically analyzed in an effort to detect the traces of illegal drugs. App. *infra* at 4a-5a.[2]

Drug testing by urinalysis is an increasingly popular technique of employee surveillance, but is nonetheless a blunt and imprecise scientific instrument. It is undisputed that a confirmed positive result (even where technically accurate) can only establish that a person was exposed to or ingested a controlled substance of unknown quantity and concentration at an unknown time in the recent past. Pl. Exh. 7, p. 3; Pl. Exh. 8, pp. 4-5.[3] Drug tests by urinalysis do not measure impairment of function at all, cannot distinguish chronic from one-time use, cannot distinguish voluntary from involuntary ingestion, and cannot distinguish between lawful and illicit use of controlled substances. *Id.*[4]

over fifty specific covered positions that ranged from clerical to professional, and included mail technicians, chemists, lawyers, criminal investigators, high administrative personnel, student trainees, and others. *Id.* at 12-13; Pl. Exh. 16; Pl. Exh. 17.

[2] "Close" observation means that the employee is not visually observed while urinating, but instead is permitted to urinate behind a partition or in a stall, in the physical presence of a monitor who listens for the "normal sounds" of urination and watches for suspicious behavior. App. *infra*. at 4a. The monitor attempts to guard against adulteration of the sample by taking possession of the subject's outer garments and personal belongings, depositing a bluing agent in the toilet tank, checking the sample for unusually warm or cold temperature, and observing chain of custody procedures. *Id.* at 4a-5a.

[3] Although the confirming test is apparently technically reliable (App. *infra* at 5a), errors in laboratory and chain of custody procedures cannot be eliminated, and will be particularly troublesome in a large-scale testing program. Pl. Exh. 7, pp. 4-5; Pl. Exh. 8, pp. 3-4.

[4] Because urine tests will detect lawful as well as unlawful use of controlled substances, Customs asks all selectees to reveal all

At best, then, drug tests by urinalysis may provide evidence that the subject once used a controlled substance. In conjunction with the revelation of personal medical information, they can provide evidence that the substance was illegally consumed. However, illegal drug users can thwart the test in at least two ways. First, by abstaining from use for a few days, or by drinking extra fluids, an individual who uses any illegal drug can almost always escape detection. App. *infra* at 5a.[5] Second, drug users who do not or cannot abstain can escape detection by adulterating their samples. Pl. Exh. 7, pp. 2-3; Pl. Exh. 8, p. 5. Urine samples can be neutralized by the addition of small amounts of commonly used substances like hand soap or table salt. *Id.* The undisputed evidence in this case demonstrated that urine tests cannot reliably detect drug use unless the act of urination is visually observed.[6]

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medications taken in the last thirty days at the time they provide their sample. App. *infra* at 4a. Employees whose tests are reported "positive" as a result of use of prescription medication must divulge personal medical information to the Customs Service in order to justify the positive result and avoid discharge. *Id.*

[5] All the drugs under investigation in the Customs program (except marijuana) always become undetectable after a few days. Even with normal fluid intake, marijuana becomes undetectable in an average of one day for persons who use the drug once a week, three days for persons who use the drug two-six days a week, and 5.3 days for the heaviest users. Pl. Exh. 7, p. 3; Pl. Exh. 8, pp. 5-6; Pl. Exh. 9, pp. 4-5. The Customs program of pre-promotion testing necessarily requires the subject to have substantial advance notice of the test. The undisputed expert evidence in this case demonstrated that, at best, the Customs program would likely detect drug use only by an addict who could not abstain and who did not take simple steps to adulterate the urine sample. It was also undisputed that, as Judge Hill recognized in dissent, these persons' drug dependency would be apparent through normal employment screening and observation. App. *infra*. at 26a.

[6] As stated by Dr. John Morgan, in an uncontradicted affidavit (Pl. Exh. 7, p. 2):

> "[The] opportunities to switch and doctor urine simply mean that in order to say with any assurance that a negative test result correlates with the non-use of drugs, the urinary stream must be carefully observed in its passage from the bodily orifice to the collection vessel."

The Customs program requires all employees selected for transfer or promotion to "covered positions" to provide urine samples for chemical analysis. The requirement applies regardless of how long or exemplary an employee's record. It applies regardless of whether any reason to suspect particular employees of illegal drug use or of questionable integrity has surfaced during their employment or during the selection process. Those who refuse to produce a urine sample would be denied the new position they have earned. Employees who "consent" and whose results are reported positive will lose their jobs.

Customs instituted its program in the summer of 1986, despite the fact that it had no evidence of employee drug use, either on or off duty. App. *infra* at 3a-4a. Customs submitted no evidence that any past on-the-job accidents or employee integrity violations had ever been attributed to drug use. Indeed, Commissioner Von Raab explicitly declared his belief that Customs was "largely drug free" when he announced the new program. *Id.* He also confessed that "the extent of illegal drug use by Customs employees was not the reason for establishing the program." Pl. Exh. 3, p. 1. Instead, the Commissioner announced, the reason for implementing the program arose out of Customs' "special responsibility to insure that its workforce remains drug free," because part of Customs' mission is to prevent illegal drugs from entering the country. *Id.*; App. *infra* at 3a.

The program was in effect for five months before the district court enjoined it. For three of those months, current employees selected for promotion were required to produce urine samples. During that entire period, all

test results for current employees were reported negative. App. *infra* at 4a.[7]

2. The district court, in a strongly worded opinion, found the urine collection and analysis plan a "degrading procedure" and ruled the drug testing program unconstitutional. App. *infra* at 40a-62a. It held, consistent with the decision of every court to consider the issue (and contrary to the government's argument), that urine testing is a "search" within the meaning of the Fourth Amendment. *Id.* at 50a-51a. Since the Customs program mandated testing absent probable cause to believe or even reasonable suspicion that an employee used drugs on or off duty, the court, weighing the government's interest in a "drug-free" workforce against the privacy interest of Customs employees, held that the program violated the Fourth Amendment. It rejected Customs' argument that the program is legal because employees voluntarily "consent" to provide urine samples. The court recognized that "it is unconstitutional for the government to condition public employment on [consent] to an unreasonable search." *Id.* at 53a. The court further found that Customs had failed to demonstrate that its interest in a "drug free" workforce was threatened, absent implementation of its program. *Id.* at 58a-59a.[8] The court enjoined the Customs Service from conducting urinalyses absent probable cause.[9]

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[7] In fact, upon testing more than 50 persons per week for five months, Customs obtained only one confirmed positive result during the entire program: the sample of a single outside applicant was confirmed positive for marijuana. App. *infra*. at 4a.

[8] The district court also concluded that the Customs drug testing program violated the constitutional right to privacy, the due process clause, and the privilege against self incrimination. App. *infra* at 54a-58a. Petitioners do not press these arguments in this Court.

[9] The district court's injunction applied to outside applicants as well as the current employees petitioners represent. App. *infra* at 61a. On appeal the court only considered the constitutionality of the program as applied to current employees. *Id.* at 21a.

3. In a split decision, on expedited appeal, the court of appeals reversed. Applying a "totality of the circumstances" approach, the majority ruled that Customs' interest in employing persons who do not use drugs in "key" drug enforcement positions outweighed the privacy expectations of Customs employees under this particular program. The court did not consider whether Customs' ability to meet its interests would be frustrated if it were required to base its demand for a urine sample on probable cause, or at least reasonable suspicion. Nor did it explain why a departure from the warrant requirement was justified in this case.

The court ruled that urine testing is a "search" and rejected the government's arguments that the Fourth Amendment does not apply at all to searches aimed at determining employees' "fitness for duty." App. *infra* at 7a-9a. The court recognized that urine testing infringes employee privacy expectations in several ways. It observed that "there are few activities in our society more personal or private than the passing of urine," and that "even the individual who willingly urinates in the presence of another does not 'reasonably expect to discharge urine under circumstances making . . . discover[y of] the personal physiological secrets it holds possible'."[10] The court also recognized that urine testing "may disclose not only the presence of drug traces but much additional personal information about an employee—whether the employee is under treatment for depression or epilepsy, suffering from diabetes, or, in the case of a female, pregnant." "Even tests limited to the detection of controlled substances," the court observed, "will reveal the use of medications prescribed for relief of pain or other medical symptoms." *Id.* at 8a.

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[10] App. *infra* at 8a, quoting *Capua* v. *City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986), and *McDonell* v. *Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).

Despite these significant intrusions into personal privacy, the court concluded that Customs had "attempted to minimize the intrusiveness of the search" because it had not required visual observation of the act of urination itself and because it permitted the urine test to be preceded by notice. It also believed the program was "limited in total scope," since no discretion is exercised in determining who is tested; instead, all employees selected for promotion are tested. App. *infra* at 11a-12a.

Customs did not attempt to justify this program on the grounds that it suspected a significant level of employee drug use. App. *infra* at 3a-4a. The court concluded that the demand for a urine sample was justified nonetheless because "use of controlled substances by employees of the Customs Service may seriously frustrate the Agency's efforts to enforce the drug laws."[11] The court noted that as an employer "the government may exact from its employees what it may not require of others." *Id.* at 14a. It conceded that the employment relationship "does not permit the government to impose unconstitutional conditions" and that the government could not require employees to consent to illegal searches by making such consent a condition of employment. *Id.* at 15a. Nevertheless, the court characterized these tests as, "to some extent, consensual," and seemed to regard it as significant that an employee could refuse to take the test and suffer no penalty, except, of course, the loss of the promotion for which he or she had been selected. *Id.* at 14a.

Although pre-existing employment devices had apparently produced a "drug free" workforce, the court concluded that the availability of alternative sources for as-

[11] App. *infra* at 13a. The court suggested that drug use by employees could undermine public confidence in the Customs Service, could make the employee susceptible to bribery or blackmail, and could endanger the safety of co-workers, where an employee carries firearms. *Id.* Customs introduced no evidence below to show that any of these threats to its mission had ever materialized.

sessing a promoted employee's integrity such as observation or a background investigation, "do not eliminate the need for urine testing." App. *infra* at 17a. The court's views were apparently based on judicial notice concerning the reliability of other employment devices.[12]

The court conceded that it also had to consider the likelihood that Customs' program would be a " 'sufficiently productive mechanism' for achieving its purposes, for no privacy invasions should be permitted unless some good end is served." App. *infra* at 18a, quoting *Delaware* v. *Prouse*, 440 U.S. 648, 659 (1979). It also recogized that "the test will usually fail to detect drugs used more than five days before testing and employees notified of a test date may simply abstain from use." *Id.* The court nonetheless ruled the program sufficiently productive of a legitimate goal, presumably deterrence. It reasoned that "addicts may not be able to abstain for five days," that particular users still face "a significant risk" that their tests would be positive, and that they may not be aware of the "fade-away effect." The court speculated that "the risk of detection therefore may deter drug using employees from seeking more sensitive positions." *Id.*

4. Judge Hill dissented from the majority's ruling. He agreed with the Court's conclusion that compulsory

[12] Customs produced no evidence to support the court of appeals' conclusions that on-the-job observation and background investigations are ineffective, and no evidence to suggest that an undetected drug problem might exist. Moreover, the court of appeals concluded (App. *infra* at 17a), without evidence, that on-the-job observation of employees working in "non-sensitive" Customs jobs provides "scant basis on which to evaluate their integrity and reliability should they be assigned to work in sensitive positions." In fact, however, the Customs program also requires employees transferring or promoted from one covered position to another to provide a urine sample. Pl. Exh. 1, p. 2. These employees thus have been observed, sometimes for many years, in "sensitive" jobs. Elsewhere in its opinion, the court opined that employees in covered positions are subject to supervision that may be more intensive than that in other positions. App. *infra* at 18a.

urine testing is covered by the Fourth Amendment, but did not agree that the program is consistent with the Fourth Amendment.

Initially, Judge Hill expressed his "reservations with the method of analysis used by the majority in deciding whether the program is reasonable under the Fourth Amendment." App. *infra* at 23a-24a, n. 1. Specifically, Judge Hill noted, "the majority offers no explanation why this case presents a situation where no warrant, no probable cause, nor even any level of suspicion is required, contrary to the language of the fourth amendment." Citing Justice Blackmun's concurrence in *New Jersey* v. *T.L.O.*, 469 U.S. 325, 351 (1985), and this Court's decision in *O'Connor* v. *Ortega*, 55 U.S.L.W. 4405, 4408-10 (March 31, 1987), Judge Hill expressed doubts concerning the majority's analytical starting point, which "substitute[ed] its balancing of interests for that of the Framers," and dispensed with the warrant and probable cause requirements without explanation. *Id.*

Judge Hill did not himself engage in what he viewed as the proper analysis because he concluded that the ineffectiveness of Customs' drug testing program, in and of itself, rendered the program unconstitutional. He noted that the program is ineffective, in part, because current incumbents are not subjected to testing and because the test is a one time occurrence. "Most importantly," Judge Hill recognized, "employees given a five day notification of a test date need only abstain from drug use to prevent being identified as a user." App. *infra* at 26a. Judge Hill was unpersuaded by the majority's rationalization that an addict may not be able to abstain for five days, observing that "it would seem that a person so addicted will be identified as a drug user without the need for a urine test." *Id.* He also disputed the majority's notion that the test was a deterrent. Judge Hill recognized that an individual could postpone applying for a covered position until the possibility of detection had passed. *Id.*

Judge Hill concluded that "the Service's program is ineffective in accomplishing the goals it purportedly seeks to accomplish." He could perceive "no reason to allow this invasion of the employees' fourth amendment rights without some concomitant benefit to society." [13]

REASONS FOR GRANTING THE PETITION

The decision below permits the government to require its employees to submit to search by urinalysis in an effort to determine whether they have used illegal drugs. This chemical surveillance requires employees to urinate on demand under the close scrutiny of a stranger, to submit to chain of custody procedures usually reserved for criminals, to disclose confidential medical information, and to reveal, through laboratory analysis of their bodily fluids, details of off-the-job activities during prior days or even weeks. Employees naturally regard these searches as demeaning, humiliating, and offensive. The searches are undertaken without probable cause and a warrant, indeed without any suspicion at all that an employee has ever used drugs.

The court below regarded these searches as reasonable under the Fourth Amendment, notwithstanding that the Customs Service did not even attempt to justify drug screening on the grounds that it suspected any employee drug use, or that it had ever had a drug problem among its employees. In an extraordinarily revealing metaphor, the court stated that "it is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chickens." App. *infra* at 15a. It would seem that the court has taken judicial notice that employees selected

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[13] App. *infra* at 26a-27a. Judge Hill emphasized that he did not mean to imply that he would find a more intrusive and far reaching program constitutional, even if it were, for those reasons, more effective. "Such a program" he said, "will also have to be examined on its own merits." *Id.* at 27a, n.3.

for promotion are predisposed to use drugs, and that that essential character trait renders superfluous any requirement of individualized suspicion.

The decision of the court below merits review because it conflicts with the Fourth Amendment precedents of this Court in both its analysis and conclusion. The lower court failed to determine that departure from the Fourth Amendment's presumptive requirements—a warrant, probable cause, or at least some quantum of individualized suspicion—was necessary to serve the interest in an effective and safe workforce that Customs articulated as the basis for its program. It concluded that the Customs program was lawful despite the fact that the searches at issue—conducted without probable cause or even reasonable suspicion—are both highly intrusive and ineffective. The court's decision establishes a dramatic limitation upon the constitutional rights of law-abiding citizens who are also public servants. The drug-testing issue is one of considerable national importance and controversy, upon which the lower courts need guidance. The errors of the court below can only serve to add further confusion to the rapidly developing law concerning drug testing in the lower courts. For these reasons, this Court should grant review.

A. The Decision of the Court Below Presents an Issue of Great National Importance on which the Lower Courts Widely Differ

As the court below recognized, "the legal questions presented by this case are serious questions of substantial import to the Customs Service and its employees and to citizens of this country." App. *infra* at 31a. Very recently, as this Court is no doubt aware, increased public attention to the use of illegal drugs in society has fueled an explosive proliferation of programs like that instituted by the Customs Service, which require unimpaired and apparently "drug free" employees to produce urine

samples for chemical analysis.[14] Ironically, the proliferation of drug testing programs comes at a time when studies show a general decline in the use of illegal drugs in the population at large.[15] At the same time, the profits of the drug testing industry have tripled and quadrupled.[16]

In this highly charged atmosphere, courts frequently do as the court below did: give short shrift to the Fourth Amendment's explicit warrant and probable cause requirements, make unwarranted factual assumptions, and speculate broadly regarding the drug problem, its causes, and its effects. *See McDonell* v. *Hunter, supra*, 809 F.2d at 1310-11 (Lay, C. J., dissenting).[17]

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[14] In September of 1986, President Reagan issued Executive Order 12564 for a "Drug-Free Federal Workplace." 51 Fed. Reg. 32889 (1986). That Order requires each federal agency to establish a plan to require applicants and current employees to submit to urinalysis conducted uniformly, randomly, or on the basis of "reasonable suspicion." At this time, no agency has yet implemented a plan, and the validity of the Order itself is being litigated in the same circuit in which this case was decided. *National Treasury Employees Union, et al.* v. *Reagan*, No. 86-4058 (E.D. La.).

[15] National Institute on Drug Abuse, "Highlights of the 1985 National Household Survey on Drug Abuse" (November, 1986).

[16] Henderson, *Drug Testing Industry Flourishes*, Washington Post, June 30, 1986 (Washington Business Section), p. 1.

[17] In this case, for example, the court of appeals' opinion makes emphatic reference to the "pernicious impact" of illicit drugs on American society, and contains speculative assertions concerning the "cost" of employee drug use nationwide. App. *infra* at 2a, 12a. While the use of illegal drugs is a national problem, it is not a new problem, nor can it reasonably be called an "epidemic," since drug use is indisputably in general decline. The court of appeals also speculated about the impact illegal drug use could have on the Customs Service, and was remarkably lax in failing to require Customs to make any empirical showing at all to justify its program. *Id.* at 3a-4a, 13a, 16a. The fact remains that Customs is admittedly essentially "drug-free" and that Customs presented no evidence to show that even a single Customs employee was ever bribed, blackmailed, dishonest, or reckless as a result of illegal drug use.

The heightened public attention to the law enforcement problems of illegal drug traffic and use (like other well publicized national concerns of the past) has resulted in powerful pressures on the judiciary to weaken the constitutional protections long afforded to all citizens, especially those who work for the government. As this Court has emphasized, "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power . . . It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273-274 (1973); *accord*, *McDonell* v. *Hunter*, *supra*, 809 F.2d at 1310 (Lay, C. J., dissenting).

The proliferation of drug testing programs similar to the program under consideration in this case, has triggered a storm of controversy and dozens of lawsuits at the federal and state levels. As the court below recognized, the state of the law concerning alcohol and drug testing is "unsettled" and presents complex constitutional issues. App. *infra* at 32a.[18] The many lower courts that have now been confronted with these issues have applied "diverse analyses" and drawn "divergent conclusions." *Id.*[19]

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[18] This Court, of course, has not yet addressed the constitutional implications of drug testing of public employees. Indeed, until the recent decision in *O'Connor* v. *Ortega*, 55 U.S.L.W. 4405 (March 31, 1987), the Court had never had the occasion to address searches in the employment context at all. *See id.* at 4412 & n.1 (Blackmun, J., dissenting).

[19] The federal courts have reached varying conclusions concerning the lawfulness of urine testing of public employees. *E.g.*, *McDonell* v. *Hunter*, *supra* (upholding random testing of certain prison employees because of need to protect prison security); *Division 241, Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (upholding reasonable suspicion and post-accident testing of bus drivers based on public safety); *Rushton* v. *Nebraska Public Power District*, 653 F. Supp. 1510 (D. Neb. 1987) (upholding annual and random urine testing of nuclear plant employees permitted unescorted access to protected area of plant); *National Association of Air Traffic Specialists* v. *Dole*, Civ. No. A87-073 (D. Alaska, March 27, 1987) (upholding annual testing of air traffic control specialists); *American Federation of Government Employees* v. *Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986) (striking down program for testing of civilian security guards at military base without individualized suspicion); *Penny* v. *Kennedy*, 648 F. Supp. 815 (E.D. Tenn. 1986) (testing of policemen without suspicion unconstitutional); *Lovvorn* v. *City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986) (testing firemen without suspicion unconstitutional); *Capua* v. *City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (same); *Jones* v. *McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986), *appeal pending*, No. 86-5198 (D.C. Cir.) (testing school bus attendants without individualized suspicion unconstitutional). *Cf. Shoemaker* v. *Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, —— U.S. ——, 55 U.S.L.W. 3389 (1986) (upholding random urine testing of jockeys on the grounds that they are voluntary participants in a heavily regulated industry).

State courts have also been faced with challenges to public employee testing programs. *E.g.*, *Patchogue-Medford Congress of Teachers* v. *Board of Education*, 505 N.Y.S. 2d 888 (A.D. 1986) (testing of teachers without individualized suspicion unconstitutional); *Turner* v. *Fraternal Order of Police*, 500 A.2d 1005 (D.C. App. 1985) (testing of police officers on the basis of reasonable suspicion upheld). *City of Palm Beach* v. *Bauman*, 475 So. 2d 1322 (D.C. App. Fla. 1985) (testing firemen without suspicion unconstitutional); *Caruso* v. *Ward*, 506 N.Y.S. 2d 789 (N.Y. Sup. Ct. 1986) (testing policemen without suspicion unconstitutional).

[20] The Seventh Circuit upheld reasonable suspicion and post-accident testing of bus drivers because of their important public safety responsibilities. *Division 241, Amalgamated Transit Union* v. *Suscy*, *supra*. The Eighth Circuit, by a 2-1 majority, ruled that prison employees who had day to day contact with maximum and medium security inmates could be subjected to random urinalyses because of the highly dangerous nature of their work. However,

The courts of appeals, too, have taken inconsistent approaches and reached inconsistent results. Although three circuits have upheld some form of public employee urine testing, only the court below has allowed testing without any individualized suspicion for a broad range of positions, most of which have no direct effect on public safety.[20] The Customs program applies to clerks, mana-

gers, attorneys, behind the scenes operatives, and others whose work, while of varying degrees of importance to Customs' drug enforcement mission, is most often not particularly "dangerous," nor did the court below uphold it on that ground.

This case is the first appellate decision to address the constitutionality of a drug testing program covering federal civilian employees. The only other circuit to have considered a federal employee drug testing case, the D.C. Circuit, has not yet squarely addressed the constitutional question. The court remanded the case for hearing on that question. Its opinion, however, gives guidance to the district court on the appropriate mode of analysis, emphasizing that the court must first determine that the search was justified "at its inception," "i.e., whether 'reasonable grounds [exist] for suspecting that the search will turn up evidence' of work-related drug use." *National Federation of Federal Employees* v. *Weinberger*, No. 86-5432, slip op. at 15 (D.C. Cir. May 15, 1987), quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 341-42 (1985); *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968). The district court must then examine whether the measures adopted are "reasonably related to the objectives of the search and not excessively intrusive." *NFFE* v. *Weinberger*, slip op. at 15-16, quoting *T.L.O.*, 469 U.S. at 341-42; *Terry* v. *Ohio*, 392 U.S. at 20. It seems clear

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other prison employees, who do not have such direct and daily contact with dangerous inmates, the court ruled, could not be tested without reasonable suspicion. *McDonell* v. *Hunter*, *supra*, 809 F.2d at 1308.

The government has relied throughout this case on *Shoemaker* v. *Handel*, 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*, 55 U.S.L.W. 3389 (1986), which upheld urine testing for jockeys. Jockeys, however, are not public employees, but independent contractors, licensees in a "highly regulated industry," to which the court explicitly limited its holding. *Id.* at 1142, n.5. We believe the reasoning in that case is seriously flawed because, among other reasons, it applied to personal searches the "administrative search" exception heretofore applicable only to physical inspections of private commercial property. *See, infra* n.26.

that a drug testing program that (like the Customs program) is not based on probable cause or reasonable suspicion could not possibly meet these tests, since, by definition, there can be no reasonable grounds to suspect the search will reveal evidence of work-related drug use.[21]

The constitutionality of public employee drug testing promises to continue to be a controversial subject of litigation. But allowing the issue to continue to ferment in the lower courts is unlikely to yield more insight or consensus than already exists. The many courts that must yet grapple with these issues must do so in the context of a much-publicized "National Crusade" against drugs. Until this Court establishes guiding principles, decisions like that of the court below threaten to establish a special drug-testing exemption from well-settled Fourth Amendment law. Until this Court reviews the matter, precious Fourth Amendment rights will be irremediably lost.

B. The Decision of the Court Below Conflicts With the Decisions of This Court

1. The court below properly held that urine testing is a search within the meaning of the Fourth Amendment. The court recognized that urination is one of the most personal and private activities in our society, and that the privacy interest surrounds both the act of urinating and the product urine, which is subjected to laboratory analysis. App. *infra* at 7a-9a. Thus, said the court, urinalysis infringes reasonable privacy expectations, and so constitutes a search. *Id.*

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[21] It must be remembered that the "reasonable grounds" analysis adopted by this Court in *New Jersey* v. *T.L.O.*, was already a significant concession to the public interest. Relaxation of the probable cause and warrant requirements was permitted in the special circumstances of a school setting in a non-criminal matter. The Court fully explored why probable cause and a warrant were not feasible, the analytical step which, as we discuss *infra* at 18-20, was completely omitted by the court below. *See, T.L.O.*, 469 U.S. at 340-343.

Where a search takes place, as this Court reaffirmed just this term in *O'Connor* v. *Ortega*, *supra*, 55 U.S.L.W. 4405, the Fourth Amendment's warrant and probable cause requirements are mandatory except where " 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search'," or where there exist " 'special circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'." *Id.* at 4408, quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 533 (1967) and *New Jersey* v. *T.L.O.*, *supra*, 469 U.S. at 351 (Blackmun, J., concurring in judgment); *accord*, *O'Connor*, *supra*, 55 U.S.L.W. at 4414-15 (Blackmun, J., dissenting). *See also*, *Arizona* v. *Hicks*, 55 U.S.L.W. 4258 (March 3, 1987), in which this Court refused to sanction even a minimally intrusive search (moving stereo equipment in plain view to locate its serial number) based on anything less than probable cause, choosing instead "to adhere to the textual and traditional standard of probable cause." *Id.* at 4260.

The essential error of the court below is that, as Judge Hill pointed out in dissent, it failed to consider or explain why, in this case, "no warrant, no probable cause, nor even any level of suspicion is required, contrary to the language of the [F]ourth [A]mendment." App. *infra* at 23a-24a, n.1. Although the majority paid lip service to the principle that searches without individualized suspicion may be upheld only "in certain limited situations" where " 'the balance of interests precludes insistence upon some quantum of individualized suspicion'," it utterly failed to analyze whether or why this case presented such a "limited situation." [22]

[22] App. *infra* at 10a, quoting *Delaware* v. *Prouse*, 440 U.S. 648, 654-55 (1979), and *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976). Indeed, the Court's sole reference to Customs' justification for dispensing with individualized suspicion was the conclusory and telling comparison of Customs employees to "foxes" in a "hen house." The court's implication—that employees already selected to receive promotions are predisposed to use drugs or commit integrity violations, and that individualized suspicion is therefore a superfluous requirement—is not supported by the record in this case or by common sense. Moreover the court's suggestion is offensive to the underlying values of the Fourth Amendment. Even criminals are entitled to be protected from searches not based on probable cause. *E.g.*, *Arizona* v. *Hicks*, *supra*.

Instead of examining whether the government's asserted interest in a drug-free workforce could be met without abandoning the probable cause and warrant requirements, the court merely weighed the government's interest against the privacy interests intruded upon. This balancing approach inevitably and unconstitutionally tips the scales in favor of the government's authority to violate expectations of privacy whenever an arguably important governmental interest in securing particular information is articulated. It would eliminate entirely the hedge against such privacy violations that exists by virtue of the warrant and probable cause requirements.

Customs' interest in determining whether an employee uses illegal drugs, for example, is certainly no more important than the government's interest in detecting or deterring criminal activity. Nonetheless "the Fourth Amendment generally protects the 'security' of 'persons, houses, papers, and effects' against official intrusions up to the point where the community's need for evidence surmounts a specified standard, ordinarily probable cause." *Winston* v. *Lee*, 470 U.S. 753, 759 (1985).

We do not question that Customs has a legitimate interest in a drug-free workplace. But it does not follow that Customs may engage in dragnet searches of its employees' bodies in pursuit of that unexceptionable goal, any more than it could search their houses, their diaries, or their telephone conversations. If the government is permitted, as Customs was here, to justify the demand for a urine sample merely by articulating a broad interest in a drug-free environment, even where the interest is not threatened, then there is no principled or

objective basis for denying the government's authority to make that demand in any case.

2. Had the court below properly analyzed whether the Fourth Amendment requisites could justifiably be abandoned on this record, it could not have upheld the testing program, consistent with the decisions of this Court. Customs was not required, and did not attempt to show that its long-standing employment devices, such as background investigations and on-the-job observation, had failed to produce the desired "drug-free" workforce. Nor did it show why those devices should not remain entirely sufficient to secure an essentially drug-free workforce. At a minimum, those devices could no doubt provide the objective indicia necessary to establish probable cause or reasonable suspicion to investigate further, perhaps with a drug test.

As an employer, the government has ample opportunity to assess employees' job performance and character, and to make reasonable inquiries into their backgrounds. On this record, these devices have clearly accomplished Customs' stated purpose. Therefore, Customs' policy of subjecting *all* employees selected for promotion to the substantial privacy invasion of urine testing, instead of employing a probable cause standard, cannot be justified on the grounds of practically or necessity. *Cf. United States* v. *Martinez-Fuerte*, *supra*, 428 U.S. at 557 (traffic checkpoint stops necessary because flow of heavy traffic renders particularized study of vehicle occupants impossible).

Because the court below unjustifiably abandoned the Fourth Amendment's presumptive requirements, it reached a result patently in conflict with the results this Court reached in *O'Connor* v. *Ortega*, *supra*, and *New Jersey* v. *T.L.O.*, *supra*. In those cases, although the Court adopted a less stringent standard than probable cause, no member of the Court suggested that searches with no suspicion could pass muster. In *O'Connor*, the plurality ruled that the search of an employee's desk and file cabinets is constitutional where there are "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct." 55 U.S.L.W. at 4410. The obverse is surely implicit: that a search for evidence of criminal conduct, like the Customs search, is unconstitutional where no such grounds for suspicion exist. Similarly, in *T.L.O.*, the Court ruled that both the state's interest in maintaining discipline in the schools and the students' privacy expectations could be accommodated by permitting searches of students based on "reasonable suspicion." Again, the flexibility required by the special school setting allowed a relaxation of the probable cause standard, but not below reasonable suspicion.

In this case, the court below approved a program of searches of employees themselves, not merely their work-related and government supplied property. There are no grounds to believe the searches will turn up any evidence of misconduct, work related or otherwise. The court below did not determine, nor could it, that the warrant, probable cause, or reasonable grounds requirements would be "unworkable," as this Court has done in other settings, *See*, *O'Connor*, 55 U.S.L.W. at 4409.

Unlike the work*place*, in which employers often need to enter the offices and desks of their employees for work related reasons, employees' urine is not the subject of frequent access or trespass by the employer. *See*, *O'Connor*, 55 U.S.L.W. at 4412 (Scalia, J., concurring). A urine search is only aimed at detecting illegal conduct. Requiring an employer to secure a warrant based on probable cause as a precondition to conducting such an extraordinary procedure is not impractical. At most, for those jobs with direct and dramatic safety impact, urine testing based on reasonable suspicion might be justified. Suspicionless searches of this highly intrusive nature

simply cannot be defended on the precedents of this Court.[23]

3. The court below vastly underrated the degree to which the Customs program is intrusive and as a result was unduly deferential to the Customs Service in finding it reasonable. Determining the level of intrusion does not admit of objective analysis; the courts recently called upon to undertake the inquiry have been less than unanimous in their assessment of the degree to which drug tests invade privacy expectations.[24] This Court has emphasized however, that "even a limited search of the person is a substantial invasion of privacy." *New Jersey* v. *T.L.O.*, *supra*, 469 U.S. at 337, citing *Terry* v. *Ohio*, 392 U.S. 1, 24-25 (1968). Compared with the search of a school student's purse, at issue in *T.L.O.*, or the search of a government-supplied desk as in *O'Connor*, the search

[23] It is significant that the privacy interests at stake here are of a far greater magnitude than those present in *O'Connor*. As the plurality recognized in *O'Connor*, "not everything that passes through the confines of the business address can be considered part of the workplace." "The workplace," the plurality concluded, "includes those areas and items that are related to work and are generally within the employer's control." "The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer's business address." 55 U.S.L.W. at 4407.

[24] In this case for example, the district court believed the Customs' program was a "degrading procedure" even more intrusive than a search of the home. App., *infra* at 50a. The court of appeals, on the other hand, indirectly compared the tests to the fixed checkpoint vehicle stops at the border which were at issue in *United States* v. *Martinez-Fuerte*, *supra*. *Id.* at 11a & n.32. In *McDonnell* v. *Hunter*, *supra*, 809 F.2d at 1311, the majority viewed urinalysis as less intrusive than a blood test or strip search, while Chief Judge Lay in dissent perceived the procedures to be more intrusive than a blood test. *See also*, *American Federation of Government Employees* v. *Weinberger*, 651 F. Supp. 726, 732, 734 (S.D. Ga. 1986) (program not requiring direct observation still highly intrusive); *but see*, *National Association of Air Traffic Specialists* v. *Dole*, *supra*, (unobserved testing not intrusive).

of an employee's body fluids, combined with the indignity of the collection procedure and the necessary revelation of private medical information, is a great deal more intrusive, humiliating, and degrading.[25]

Moreover, it should be obvious that any dragnet procedure that takes in far more innocent than guilty subjects is highly invasive of the privacy expectations of the vast majority. *See*, *e.g.*, *Delaware* v. *Prouse*, *supra*, 440 U.S. at 659-660. Such a dragnet cannot reasonably be compared with the search of an individual under suspicion of misfeasance or criminal conduct. Such a dragnet could never be justified unless the searches were absolutely necessary to combat a known and serious public safety problem. *See* discussion of efficacy, point 4 *infra* at 25-27.[26]

[25] Indeed, this Court has recognized that analogous procedures, like the chemical analysis of a motorist's blood sample to determine its alcohol content implicate the "most personal and deep rooted expectations of privacy." *Winston* v. *Lee*, *supra*, 470 U.S. at 760 (1985), citing *Schmerber* v. *California*, 384 U.S. 757 (1966).

[26] The court of appeals, like the Third Circuit in *Shoemaker* v. *Handel*, *supra*, 795 F.2d 1136, attempted to bolster the outcome it reached by reference to this Court's decisions that have upheld warrantless inspection schemes in highly regulated industries. App., *infra* at 16a-17a. As noted earlier, however, those cases concerned inspections of physical conditions at commercial premises, not personal searches. *See*, *Donovan* v. *Dewey*, 452 U.S. 594, 598-99 (1981) (distinguishing warrantless inspections of commercial property from searches of homes); *id.* at 608 (Rehnquist, J. concurring) (same); *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 537 (distinguishing inspection of property from personal searches). Moreover, in those cases the Court emphasized the fact that the legislature had determined that a warrantless inspection scheme was necessary for a regulatory program's effectiveness. *E.g.*, *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 77 (1970); *United States* v. *Biswell*, 406 U.S. 311, 315 (1972); *Donovan* v. *Dewey*, 452 U.S. at 600, 603. The Customs program is entirely a creation of the executive branch, both as to its requirement that employees be "drug-free" and its method for assuring compliance with that requirement. Finally, the court's suggestion that an analogy to highly regulated industries in and of itself justified a

The court below found it significant that these searches take place in the employment context, apparently suggesting a lowered privacy expectation. Stating that "[g]overnment employees may be subject to searches or other restraints on their liberties" that would be impermissible outside the employment relationship, the court concluded that "work-related searches that 'are mostly incident to the primary business of [an] agency' may satisfy the fourth amendment's reasonableness requirement." App. *infra* at 14a. Although the court purported to quote directly from the *O'Connor* decision, in fact it misquoted, and seriously distorted this Court's language.[27]

The *O'Connor* plurality did *not* suggest a different constitutional standard for government employees and for private citizens. On the contrary, the Court recognized that rights are not lost "merely because [individuals] work for the government instead of a private employer." *O'Connor*, 55 U.S.L.W. at 4408.[28] And while the plural-

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warrantless and suspicionless search scheme for public employees is incorrect. Even where Congress devises a warrantless inspection program, its constitutionality is still dependent on a showing, not made here, that departure from the warrant and probable cause or individualized suspicion requirements is necessary to meet the goals of a regulatory scheme. *E.g., Donovan* v. *Dewey, supra*, 452 U.S. at 603; *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 315-320, 321 (1978); *United States* v. *Biswell, supra*, 406 U.S. at 316.

[27] The *O'Connor* plurality, in holding that the "realities of the workplace" make a warrant requirement burdensome and unreasonable, actually said that "work-related searches [unlike criminal investigations] are *merely* incident to the primary business of the agency." *O'Connor*, 55 U.S.L.W. 4409 (emphasis added).

[28] The Court rejected the notion that the Fourth Amendment's protections are less than fully available in the employment context. Quoting *New Jersey* v. *T.L.O., supra*, 469 U.S. at 335, and *Camara* v. *Municipal Court, supra*, 387 U.S. at 530, this Court stated in *O'Connor* that "[b]ecause the individual's interest in privacy and security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' . . . it would be anomalous to say that the

ity in *O'Connor* found probable cause an inappropriate standard for searches of government-supplied desks and filing cabinets, this Court by no means ruled that the probable cause requirement is inapplicable merely because a particular search is work-related, not criminal, much less that work-related searches could be conducted without any individualized suspicion at all. In fact, with the sole exception of prison inmate searches, we are unaware of any case, either in the criminal or non-criminal context, where this Court has approved a search of an individual's body or its fluids without requiring at least some degree of individualized suspicion.[29]

4. Finally, review of the court of appeals decision is warranted here on another ground, one argued by petitioners below, and adopted by Judge Hill in dissent. To pass constitutional muster, a search must be in service of an important governmental interest, and it must be a "sufficiently productive mechanism to justify [its] intrusion upon Fourth Amendment interests." *Delaware* v. *Prouse, supra*, 440 U.S. at 658-59. *See also, New Jersey* v. *T.L.O., supra*, 469 U.S. at 337 (privacy expectations must be balanced against "the government's need for

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individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 55 U.S.L.W. at 4407.

[29] It is also well settled that an unreasonable search cannot be made reasonable by the government's exaction of "consent" as a condition of employment. *See Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *NFFE* v. *Weinberger, supra*, slip op. at 16. While the court below seemed to recognize this principle, at the same time it viewed "voluntariness" as somehow important in the reasonableness question. It described the tests as, "to some extent, consensual," noting that one would not be penalized for withdrawing his application rather than submitting to the test. App. *infra* at 14a. The court did not seem to appreciate that the employee is unquestionably sacrificing the promotion already earned by withdrawing, so the decision to submit to the test can hardly be said to be "voluntary." The court's observation (*id.* at 15a) that "the exaction of consent as a condition of assignment to the new job is not unreasonable" is a contradiction in terms.

effective methods to deal with breaches of public order") (emphasis added); *Schmerber* v. *California*, *supra*, 384 U.S. at 771 (noting that blood test is "highly effective" means of determining intoxication level). Contrary to this Court's rulings, the court below approved a program of searches that is not even minimally effective to serve Customs' purported interests in an effective, honest, and safe workforce.

While Customs' stated interest may be entirely legitimate, it must be appreciated that urine testing must directly and effectively serve that interest in order to be considered reasonable. It is undisputed that this program is not being used to combat any known or reasonably suspected problem of drug abuse among Customs employees. Under this Court's decisions, however, the government must actually face a serious threat before it undertakes to solve that problem by intrusive means. The uncontroverted evidence in this case shows that the Customs program will be a virtually useless one. It will not detect drug use, nor has there been shown to be a need for new deterrence measures.

The Customs program is ineffective to *detect* users of illegal drugs because virtually any drug user can escape detection by abstinence or by adulterating his or her sample. As we have noted, on-the-job observation and background investigations are patently more effective and reliable devices for detecting unreliable employees than a urine test, which can be frustrated at the subject's option.

Similarly, the program is not an effective *deterrent* to prevent illegal drug users from seeking covered positions because the undisputed evidence shows that the chance of detection is nil if an individual abstains. Assuming drug users would even be interested in applying for Customs positions, it simply defies common sense to assert that these individuals, who are not deterred by a thorough background investigation or by the nature of their

duties, would be deterred by an ineffective, one-time urine test.[30]

Moreover, since there is no perceptible problem of drug abuse, no need has been shown for new deterrent measures. Nor can the effectiveness of the deterrent be measured, since no decrease in drug abuse can be observed. The government is thus in the enviable position to claim success whether or not any drug abusers are ever caught.

It was important to the court below that the Customs Service is an agency part of whose mission is drug interdiction. However, even if it is important that employees involved in that mission be drug-free, these facts remain: Customs has had no discernible drug problem to address, and no reason to expect that it will, given the careful pre-employment background investigations and on-the-job observation that takes place, and given the steady decline of drug abuse in the population for the past ten years. Customs therefore has demonstrated no need to undertake these highly intrusive searches. Moreover, because it has chosen a search tool that cannot effectively serve its stated goal, even were the urine tests to be considered minimally intrusive, the Customs program would violate the Fourth Amendment.

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[30] The Customs test is at least as defectively unproductive as the random license checks this Court ruled unconstitutional in *Delaware* v. *Prouse*. As the Court noted there, "it seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed driver will be large indeed. . . . Furthermore, and again absent something more than mere assertion to the contrary, we find it difficult to believe that an unlicensed driver would not be deterred by the possibility of being involved in a traffic violation or having some other experience calling for proof of his entitlement to drive but that he would be deterred by the possibility that he would be one of those chosen for a spot check." 440 U.S. at 659-660.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1987

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS

No. 86-3833

NATIONAL TREASURY EMPLOYEES UNION and ARGENT ACOSTA, PRESIDENT, CHAPTER 168, NATIONAL TREASURY EMPLOYEES UNION,
Plaintiffs-Appellees,

v.

WILLIAM VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE,
Defendant-Appellant.

April 22, 1987

Appeal from the United States District Court
for the Eastern District of Louisiana

Before RUBIN, HILL, and EDWARDS,* *Circuit Judges.*

ALVIN B. RUBIN, Circuit Judge:

A union challenges a program adopted by the Customs Service requiring employees seeking transfer to certain

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* Circuit Judge of the Sixth Circuit, sitting by designation.

sensitive jobs to submit to urine testing for drug use. The prevention of illicit drug use has become a major national concern. Congress has appropriated unprecedented sums to interdict drug smuggling, the President has issued an executive order requiring all federal agencies to adopt programs that will eliminate drugs from the federal workplace,[1] and hundreds of private employers, including more than a quarter of the Fortune 500 companies, have instituted some kind of program for urinalysis testing of employees.[2] Employee drug use costs the United States an estimated $33 billion per year.[3] The seriousness of the problem has led to efforts to combat drug use by the use of novel methods, such as compulsory testing. Adoption of these methods, however, has created concern that constitutional rights may be abridged in the process.[4] Even the war on crime must be fought by constitutional methods for the Constitution protects the guilty as well as the innocent and proscribes condemned means even when they are used for laudable ends. Considering all of the circumstances involved, we hold that the Customs Service testing program constitutes a search within the meaning of the fourth amendment, but, because of the strong governmental interest in employing individuals for key positions in drug enforcement who themselves are not drug users and the limited intrusiveness of this particular program, it is reasonable and, therefore, is not unconstitutional.

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[1] Exec. Order No. 12,564, 55 U.S.L.W. 2177-78 (Sept. 20, 1986); N.Y. Times, Feb. 20, 1987, § 1, at 9, col. 6 (National Edition).

[2] Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U.Pitt.L.Rev. 201, 202 (1986).

[3] *Id.* at 203.

[4] Curran, *Compulsory Drug Testing: The Legal Barriers*, 316 N.E.J.M. 318, 318 (1987).

I.

For some time, the United States Customs Service has viewed the interdiction of narcotics smuggling as its top priority and has forbidden its employees to use the very drugs they are employed to intercept. In July, 1986, pursuant to a Directive by its Commissioner, the Service implemented a urinalysis drug screening program for applicants tentatively selected to engage in three kinds of jobs: positions that either directly involve the interdiction of illicit drugs, require the carrying of a firearm, or involve access to classified information. The covered positions start with top administrative posts and include criminal investigators, intelligence officers, customs inspectors, and even those clerical workers assigned to the tasks described. At first, the Customs Service tested only applicants for initial employment by the Service; after two months, the program was extended to current employees seeking a transfer to a covered position. Because no applicant for initial employment is a party to this suit, we consider the constitutionality of the program only as it applies to current employees seking a transfer.

When it instituted the program, the Customs Service emphasized its "special responsibility to insure [a drug-free] work-force." The Service is charged with "stemming the tide of illicit drugs entering [the United States]." Consequently, "Customs employees, more than any other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use. . . . as well as [to] illegal substances themselves." Illegal drug use "undermines . . . the integrity of the Service," and, because illicit drugs are so expensive, drug users may be particularly susceptible to offers of bribes by smugglers.

The Customs Service did not attempt to justify drug screening on the ground that it suspected a significant

level of drug use among its employees. Indeed, the Commissioner has described the Service as "largely drug free," and, in five months of testing, none of the tests of current employees seeking a job change was positive. Even among applicants not already employed, only one person's test was positive.

Under the drug-testing program, an employee tentatively selected for transfer to a covered position is advised in writing that the appointment is contingent upon successful completion of drug screening. At least five days after the Service sends the employee this notification, it schedules a time for his urinalysis. If the employee then withdraws his application, he may retain his present position, and no adverse inference is drawn from his decision not to pursue his application. At the test site, an observer gives the employee a form on which he may list any medications he has taken or any other legitimate reasons for his having been exposed to potentially illicit drugs in the preceding thirty days. The form is sealed in an envelope that will not be opened unless the urine test is positive.

After the employee surrenders his outer garments and personal belongings, the observer gives the employee a bottle for the specimen. The employee then enters a restroom stall and produces the urine sample. In order to prevent tampering, the observer remains in the restroom to listen for the normal sounds of urination and to collect the sample immediately after urination, but the observer does not visually observe the act of urination. The employee then leaves the stall and presents the bottle containing the specimen to the observer. To ensure that a previously collected sample has not been proffered, the observer is instructed to reject an unusually hot or cold sample.

The Service uses strict chain-of-custody procedures after collection. The observer applies a tamper-proof seal to the

bottle, the employee initials a label affixed to the seal and signs a chain-of-custody form, and the observer signifies that the procedures have been correctly followed. The observer then seals the sample in a bag together with other samples and mails the bag to a laboratory where both a tracking system and chain-of-custody record are maintained.

Laboratory employees test the samples for marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP). Initially, all samples are screened by the enzyme-multiplied-immunoassay technique (EMIT). Because EMIT yields a significant rate of positive results even in the absence of drug use, all positive samples are then screened by gas chromatography/mass spectrometry (GC/MS). Both parties agree that GC/MS provides a highly accurate test for the presence of drugs, assuming proper handling, storage, and testing techniques. If the GC/MS test is positive, the employee may designate a laboratory to test the original sample independently. Because EMIT will generally report the test for drug use as negative when five days have elapsed between the last use of drugs and the testing date, the test may fail to detect the prior use of drugs by persons who have abstained for five days.

The district court permanently enjoined all drug testing, both of employees and applicants for employment, 649 F.Supp. 380 (1986). It characterized the program as a search and seizure that violates legitimate expectations of privacy in the absence of probable cause or reasonable suspicion. Consequently, it held the testing unconstitutional under the fourth amendment. Although the issues were not raised by the union, the court also found that the plan violated the privilege against self-incrimination, penumbral constitutional rights of privacy, and, because of its unreliability, the due process clause.

II.

The fourth amendment states

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . .

As the Supreme Court recently reiterated in *Winston v. Lee*,[5] " 'the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.' "[6] The values of individual privacy and dignity are " 'basic to a free society,' "[7] and the fourth amendment protects these values by recognizing the "individual's legitimate expectations that in certain places and at certain times he has 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.' "[8]

The amendment explicitly protects against two different types of governmental invasion: searches and seizures. A search occurs when the government infringes "an expectation of privacy that society is prepared to consider reasonable."[9] Seizure of a person occurs when the government meaningfully interferes with his liberty,[10] and seizure of property occurs when the government meaningfully interferes with an individual's possessory interests in property.[11]

[5] 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985).

[6] *Id.* at 759-60, 105 S.Ct. at 1616 (quoting *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966)).

[7] *Winston*, 470 U.S. at 759-60, 105 S.Ct. at 1616 (quoting *Schmerber*, 384 U.S. at 767, 86 S.Ct. at 1834).

[8] *Winston*, 470 U.S. at 757-58, 105 S.Ct. at 1615-16 (quoting *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting)).

[9] *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984).

[10] *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968).

Not all invasions of privacy or interferences with liberty or property, then, are searches or seizures. Before the infringement can be labeled either "search" or "seizure," in the sense in which those words are used in the fourth amendment, the government action must be *unreasonable* or constitute a *meaningful* interference. These criteria are implied from the very use of the terms, "search" and "seizure." In addition, by its express text, the amendment prohibits only those searches and seizures that are unreasonable in the particular circumstances in which they are performed. In determining the constitutionality of the testing program, therefore, we look first to whether the urinalysis program is such a significant intrusion as to constitute a search or seizure, or both search and seizure,[12] in the sense in which those terms are used in the Constitution, and, if we determine it to be a search or seizure, then decide its reasonableness.

Because urine is a waste product routinely discharged from the body, and the testing is performed on a scheduled basis only if an employee has been tentatively selected for transfer to a covered position, the government contends that the Customs Service test does not infringe an employee's reasonable expectation of privacy or interfere meaningfully with his liberty or property and is therefore neither search nor seizure. The urine excreted for a drug test, however, is not expected to be a waste product, flushed down a toilet. Indeed precautions are taken in the test procedure to prevent the sample from being thus disposed of.

In several ways, drug screening by urinalysis infringes the employee's reasonable expectation of privacy and

[11] *Jacobsen*, 466 U.S. at 113, 104 S.Ct. at 1656.

[12] *Texas v. Brown*, 460 U.S. 730, 747-48, 103 S.Ct. 1535, 1546, 75 L.Ed.2d 502 (1983) (Stevens, J., concurring).

thereby constitutes a search under the fourth amendment. There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom. While individuals may choose not to urinate in private but instead to use public toilet facilities, they make this choice themselves. Moreover, expectations of privacy in a particular activity do not exist on an all-or-none basis.[13] An individual, for example, may freely admit guests to his home without relinquishing the right to bar others [14] or may open the curtains of his home to the view of unenhanced vision without consenting to the view of a telescope.[15] Similarly, even the individual who willingly urinates in the presence of another does not " 'reasonably expect to discharge urine under circumstances making . . . discover[y of] the personal physiological secrets it holds' " possible.[16]

Urine testing may disclose not only the presence of drug traces but much additional personal information about an employee—whether the employee is under treatment for depression or epilepsy, suffering from diabetes, or, in the case of a female, pregnant. Even tests limited to the detection of controlled substances will reveal the use of medications prescribed for relief of pain or other medical symptoms.

Another perspective often sharpens the question whether a particular government action implicates the

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[13] *O'Connor v. Ortega*, —— U.S. ——, ——·——, 107 S.Ct. 1492, 1504-05, 94 L.Ed.2d —— (1987) (Scalia, J., concurring).

[14] *United States v. Lyons*, 706 F.2d 321, 325 (D.C.Cir. 1983).

[15] *United States v. Taborda*, 635 F.2d 131, 138-39 (2d Cir. 1980).

[16] *Capua v. City of Plainfield*, 643 F.Supp. 1507, 1513 (D.N.J. 1986) (quoting *McDonnell v. Hunter*, 612 F.Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987)).

fourth amendment: the consequences of the characterization. As we observed in *Horton v. Goose Creek Independent School District*,[17] "[i]f an activity is not a search or seizure . . . the government enjoys a virtual carte blanche to do as it pleases." [18] Hence, a finding that urine testing for drugs is not a search necessarily presumes that the ordinary individual's reasonable expectation of privacy would not be offended if the government, even without any articulable basis for suspicion, notified a person who had otherwise been properly stopped (seized, in the legal sense) that he must submit a urine sample for analysis. That presumption simply does not comport with contemporary mores. Unlike one's hair [19] or handwriting [20] one's urine is not routinely exposed to the public gaze.

For these reasons, and in accordance with the other courts that have decided the question, we hold that compulsory urine testing by the government constitutes a search for purposes of the fourth amendment.[21] While compulsory urine testing is less aptly characterized as a seizure because the individual is not held against his will and the urine excreted cannot be considered meaningful property, the remainder of our analysis would apply equally whether the test is considered only a search, only a seizure, or both.

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[17] 690 F.2d 470 (5th Cir. 1982) (per curiam), *cert. denied*, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1983).

[18] *Id.* at 476.

[19] *United States v. Weir*, 657 F.2d 1005 (8th Cir. 1981) (per curiam).

[20] *Gilbert v. California*, 388 U.S. 263, 265-67, 87 S.Ct. 1951, 1953-54, 18 L.E.2d 1178 (1967).

[21] *See, e.g., McDonnell*, 809 F.2d at 1307; *Capua*, 643 F.Supp. at 1513; *Allen v. City of Marietta*, 601 F.Supp. 482, 488-89 (N.D.Ga. 1985). For a listing of the cases involving compulsory urine testing for drug use by employers, see the Appendix to this opinion.

III.

Because the fourth amendment proscribes only searches and seizures that are unreasonable,[22] we now analyze the Customs Service's urine testing program to determine whether it is a forbidden search. As the Supreme Court emphasized in *Bell v. Wolfish*,[23] that determination cannot be precisely made or decided by general rules susceptible of mechanical application. The validity of each different kind of search must be assessed by balancing the social and government need for it against the risk that the search will itself undermine the social order by unduly invading personal rights of privacy.[24] "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted," the Court said in *Wolfish*.[25] While "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." [26] In certain limited situations,[27] "the balance of interests precludes insistence upon 'some quantum of individualized suspicion.'" [28] The Union concedes that the Customs Service might test employees who seek transfers if there were

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[22] *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41, 105 S.Ct. 733, 743, 83 L.Ed.2d 720 (1985).

[23] 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

[24] *Id.* at 559, 99 S.Ct. at 1884.

[25] *Id.*

[26] *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976).

[27] *T.L.O.*, 105 S.Ct. at 743 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277, 93 S.Ct. 2535, 2541, 37 L.Ed.2d 596 (1973) (Powell, J., concurring).

[28] *Delaware v. Prouse*, 440 U.S. 648, 654-55, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979) (quoting *Martinez-Fuerte*, 428 U.S. at 560, 96 S.Ct. at 3084).

some degree of individualized suspicion, so we must balance the factors involved when tests are conducted in the absence of any such suspicion. The determination of fourth-amendment reasonableness requires consideration of the totality of circumstances in a particular case, weighing all of the factors suggesting constitutional violation against all of those indicating validity. We examine the factors here relevant, turning first to those memtioned by the Supreme Court in *Wolfish*.

A. SCOPE AND MANNER

The Service has attempted to minimize the intrusiveness of the search. Unlike the procedure used when screening firefighters in *Capua v. City of Plainfield*,[29] the tester does not watch the employee while the urine sample is being produced. In addition, the screening is scheduled in advance instead of by surprise,[30] and employees are not tested until they have passed the other requirements for transfer to their new positions and have been tentatively approved. The degree of privacy invasion, while serious enough to implicate the fourth amendment, is not as intrusive as an invasion of bodily integrity [31] or of the home,[32] nor do employees suffer the indignity of either strip or body cavity searches.

The Customs Service program is also limited in total scope, thereby preventing the exercise of discretion concerning who is to be tested. Only employees seeking transfer to sensitive positions are required to take the test and only as a result of a process that they choose to set in motion. The urinalysis results are either positive or negative leaving no room for official discretion in

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[29] 643 F.Supp. 1507, 1514 (D.N.J. 1986).

[30] *Id.* at 1518.

[31] *Schmerber*, 384 U.S. at 767-70, 86 S.Ct. at 1834-35.

[32] *Martinez-Fuerte*, 428 U.S. at 561, 96 S.Ct. at 3084.

interpreting the tests.[53] The procedure therefore observes the requirement that, when searches are permitted in the absence of individualized suspicion, the government must employ safeguards to ensure that "the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.'"[54] Justice Powell observed in *Almeida-Sanchez v. United States*[55] that prosecutors "should not be the sole judges of when to use constitutionally sensitive means,"[56] but the testing program involves neither prosecutor nor prosecution. Under the Customs Service program, employees are protected from the abuses possible when government officials enjoy "almost unbridled discretion . . . as to when . . . and whom to search."[57]

B. JUSTIFICATION

The use of illicit drugs has had a pernicious impact on American society. It significanty compromises the public's health, safety, and security. Drug smuggling has become an increasingly sophisticated enterprise, posing a formidable challenge to law enforcement. Moreover, the lucrative rewards for success provide a continuing temptation to engage in the unlawful enterprise. Congress has taken a number of measures to interdict drug smuggling,[58] including the budget increase that we have already mentioned.

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[53] *Shoemaker v. Handel*, 795 F.2d 1136, 1143 (3d Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986).

[54] *Prouse*, 440 U.S. at 655, 99 S.Ct. at 1396-97 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 532, 87 S.Ct. 1727, 1733, 18 L.Ed.2d 930 (1967).

[55] 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973).

[56] *Id.* at 280, 93 S.Ct. at 2543 (Powell, J., concurring).

[57] *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323, 98 S.Ct. 1816, 1826, 56 L.Ed.2d 305 (1978).

[58] Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, 100 Stat. 3207 (1986).

Use of controlled substances by employees of the Customs Service may seriously frustrate the agency's efforts to enforce the drug laws. An employee's use of the substances he has been hired to interdict casts substantial doubt upon his ability to carry out his duties honestly and vigorously,[59] and undermines public confidence in the integrity of the Service.[60] The drug user's questionable integrity, as well as the high financial cost of obtaining illegal drugs, may increase his susceptibility to bribery by criminal drug enterprises seeking classified information. Indeed, several Customs officers have been fired in past years for integrity violations such as accepting bribes. Drug suppliers may also subject a drug-using employee to blackmail. The illicit drug user may be tempted to divert for his own use portions of drug shipments that are seized. Finally, those employees involved in field operations, particularly if carrying firearms, endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use. Like other public agencies,[61] the Customs Service has a strong interest in ensuring that its employees operate effectively. While a legislative declaration of the need for a particular search helps demonstrate its reasonableness,[62] an administrative declaration of need may suffice.[63]

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[59] *Heron v. McGuire*, 803 F.2d 67, 68 (2d Cir. 1986) (per curiam); *Masino v. United States*, 589 F.2d 1048, 1056, 218 Ct.Cl. 531 (1978).

[60] *Shoemaker*, 795 F.2d at 1142.

[61] *Ortega*, —— U.S. at —— - ——, 107 S.Ct. at 1500-01 (plurality opinion).

[62] *Serpas v. Schmidt*, 808 F.2d 601 (7th Cir. 1986).

[63] *Colorado v. Bertine*, —— U.S. ——, 107 S.Ct. 738, 740, 741, 93 L.Ed.2d 739 (1987).

C. PLACE

The place at which the search is conducted, a restroom, is the most private facility practicable.

D. VOLUNTARINESS

The Customs Service test is, to some extent, consensual. It is required only from those individuals who voluntarily seek employment in a covered position knowing in advance of the urinalysis requirement. Moreover, an employee will not be penalized in his current job nor will he be disfavored if he reapplies later. The only adverse consequence that will follow a withdrawal of the application before testing is loss of the currently sought transfer. Only employees who test positive are subject to removal from the Service.

E. EMPLOYMENT RELATIONSHIP

To fulfill its governmental function, the government must also be an employer of private citizens. As an employer, the government may exact from its employees what it may not require of others. Government employees may be subject to searches or other restraints on their liberties that would be impermissible in the absence of the employment relationship so long as these requirements are reasonably aimed at assuring integrity and competence.[44] Work-related searches that "are mostly incident to the primary business of [an] agency" may satisfy the fourth amendment's reasonableness requirement.[45]

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[44] *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968); *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.) (per curiam), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976).

[45] *O'Connor v. Ortega*, —— U.S. at ——, 107 S.Ct. at 1500 (plurality opinion).

This power to take those steps necessary to carry on the business of government is not, of course, without limits. The employment relationship does not permit the government to impose unconstitutional conditions and the government cannot, therefore, undertake searches of its employees simply by making consent a condition of employment. Like consent to routine searches of paper bags as a condition of employment in a penitentiary,[46] the search must be a "reasonable condition of employment."[47] Considering the nature and responsibilities of the jobs for which applicants are being considered at Customs and the limited scope of the search, the exaction of consent as a condition of assignment to the new job is not unreasonable. It is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chickens.

F. ADMINISTRATIVE NATURE OF THE SEARCH

The Customs Service program has been adopted solely for an administrative purpose. While the fourth amendment protects against invasions for civil as well as criminal investigatory purposes,[48] the need for protection against governmental intrusion diminishes if the investigation is neither designed to enforce criminal laws nor likely to be used to bring criminal charges against the person investigated. Thus, when the police undertake "routine administrative caretaking functions" like inventory searches, particularly when they are not a subterfuge for criminal investigations, "[t]he probable-

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[46] *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977).

[47] *Id.* at 351. *See also Ortega*, —— U.S. at ——-——, 107 S.Ct. at 1498-99 (plurality opinion).

[48] Ortega, —— U.S. at ——-——, 107 S.Ct. at 1496-98 (plurality opinion); *T.L.O.*, 469 U.S. at 334, 105 S.Ct. at 740.

cause approach" and its concomitant requirement of a warrant are "unhelpful." [49] Similarly, visits by government officials to the homes of welfare recipients for the purpose of evaluating their eligibility for benefits do not abridge the fourth amendment.[50]

Even a search solely for an administrative purpose is not per se reasonable.[51] The ubiquitous balancing test applies in this determination as well, entailing a weighing of the need for the search against its intrusiveness. Urine testing serves primarily the administrative funciton of assessing suitability for employment in a sensitive position, but it does so by searching for evidence of improper behavior. Such screening is not therefore as far removed from criminal investigation as routine inventory searches of an arrestee's personal effects to guard against claims of theft. Consequently, it is important that the government has demonstrated a need to test applicants for sensitive positions in order to assure both the integrity of the Customs Service and the absence of possible moral risk in the performance of their new duties by these applicants.

G. ANALOGY TO REGULATED INDUSTRY

The Supreme Court has also recognized that, to ensure compliance with a regulatory scheme applicable to highly regulated industries, the government may undertake inspections of the premises occupied by those industries without a warrant [52] and without any degree of

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[49] *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5, 96 S.Ct. 3092, 3097 n. 5, 49 L.Ed.2d 1000 (1976); *accord Bertine*, 107 S.Ct. at 741. *See also Ortega*, —— U.S. ——-——, 107 S.Ct. at 1500-01 (plurality opinion).

[50] *Wyman v. James*, 400 U.S. 309, 317-25, 91 S.Ct. 381, 386-90, 27 L.Ed.2d 408 (1971).

[51] *See, e.g., Bertine*, 107 S.Ct. at 742.

[52] *Donovan v. Dewey*, 452 U.S. 594, 598-600, 101 S.Ct. 2534, 2537-39, 69 L.Ed.2d 262 (1981).

individualized suspicion.[53] The exception occurs when warrantless searches are necessary to accomplishment of the regulatory scheme and when the very existence of the federal regulatory program diminishes the reasonable expectations of privacy of those involved in the industry.[54] While this case does not involve a highly regulated private industry, it calls for the same kind of balance between the need for the search and the invasion of the individual's expectation of privacy. Individuals seeking employment in drug interception know that inquiry may be made concerning their off-the-job use of drugs and that the tolerance usually extended for private activities does not extend to them if investigation discloses their use of drugs.

H. AVAILABILITY OF LESS INTRUSIVE MEASURES

While a particular search may be reasonable even if its purpose might be accomplished by less intrusive methods,[55] the availability of alternative sources of information or evidence [56] must at least be considered in determining the reasonableness of a particular search. In this case, the alternative sources of information do not eliminate the need for urine testing. Although the Service has had an opportunity to observe the performance of employees while they were working in non-sensitive positions, this provides scant basis on which to evaluate their integrity and reliability should they be assigned to work in sensitive positions.

The Service does screen applicants for sensitive positions by conducting full-field-background investigations.

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[53] *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972).

[54] *Dewey*, 452 U.S. at 600, 101 S.Ct. at 2539.

[55] *Bertine*, 107 S.Ct. at 743; *Illinois v. Lafayette*, 462 U.S. 640, 647-48, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983).

[56] *Winston*, 470 U.S. at 764, 105 S.Ct. at 1619; Miller, *Urinalysis Testing*, *supra* note 2, at 214.

Those interviewed, however, may be reluctant to disclose their knowledge of the employee's drug use or may be unaware of his use, either because the employee has not disclosed this activity or because he has submitted names of only those references who do not know of his use. In any event, background investigations are themselves intrusive invasions of an individual's privacy.

I. EFFECTIVENESS

As the Union observes, we must also consider the likelihood that the search will be a "sufficiently productive mechanism" for achieving its purposes,[57] for no privacy invasions should be permitted unless some good end is served. Because the test will usually fail to detect drugs used more than five days before testing and employees who have been notified of a test date may simply abstain from use, the Union concludes that the test sets a trap that will always be empty. Addicts may not be able to abstain for five days, however. Moreover, although drug screening may not detect many drug users who abstain for the several days preceding the test, a particular user still faces a significant risk that his test would be positive. Finally, employees may not always be aware of the fade-away effect. The risk of detection therefore may deter drug-using employees from seeking more sensitive positions.

Our brother Hill advances as a basis for his dissent that the test is not sufficiently effective in other ways: employees currently in sensitive positions are not tested and those transferred to sensitive positions are not again tested. Employees in sensitive positions are, however, subject to supervision that may be more intensive than employees in routine tasks. Moreover, offsetting the lesser effectiveness that is achieved by testing only applicants for sensitive jobs is the fact that these persons have volunteered for the jobs and have, in effect, by not

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[57] *Prouse*, 440 U.S. at 659, 99 S.Ct. at 1399; Miller, *Urinalysis Testing*, *supra* note 2, at 214.

withdrawing after notice, at least acquiesced in the test. The dissent, inconsistently it seems to us, argues that the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy.

Taking all of the relevant factors into account, we conclude that the Customs Service program for testing employees who seek a transfer to sensitive positions is not unreasonable.

IV.

Testing urine for the presence of drugs does not violate the privilege against self-incrimination. The privilege applies only to evidence that is testimonial.[58] Like blood samples,[59] voice exemplars,[60] or line-up identifications,[61] urine samples reveal "physical characteristics" only, not "any knowledge [the person tested] might have." [62]

When the employee lists the medications taken and any circumstances involving legitimate contact with illicit drugs in the preceding thirty days, testimonial evidence is involved. The fifth amendment, however, protects compelled disclosure of incriminating information, not information that is merely private.[63] Questions about medications or legitimate contact with illicit drugs

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[58] *Fisher v. United States*, 425 U.S. 391, 408-09, 96 S.Ct. 1569, 1579-80, 48 L.Ed.2d 39 (1976); Note, Organizational Papers and the Privilege Against Self-Incrimination, 99 Harv.L.Rev. 640, 644 (1986).

[59] *Schmerber*, 384 U.S. at 760-65, 86 S.Ct. at 1830-33.

[60] *United States v. Dionisio*, 410 U.S. 1, 5-7, 93 S.Ct. 764, 767-68, 35 L.Ed.2d 67 (1973).

[61] *United States v. Wade*, 388 U.S. 218, 221-23, 87 S.Ct. 1926, 1929-30, 18 L.Ed.2d 1149 (1967).

[62] *Id.* at 222, 87 S.Ct. at 1930.

[63] *United States v. Nobles*, 422 U.S. 225, 233 n. 7, 95 S.Ct. 2160, 2167 n. 7, 45 L.Ed.2d 161 (1975).

do not, by their nature, seek incriminating information. Like income tax returns, the Customs Service pre-testing forms may elicit incriminating information, but in the great majority of cases, they will not.[64] Indeed, the information will more likely exculpate the employee. The purpose of the questions is to discover information that will explain why a particular positive test does not reflect drug use and therefore permit the Customs Service to transfer the employee. And, even if the information were incriminating, it is hard to see how it would add significantly to the incrimination of the urine test.[65] The Union has not argued that the questions will elicit incriminating information;[66] in fact, the union does not even urge us to uphold the district court on fifth amendment grounds. Our decision not to strike the pre-test forms on fifth amendment grounds does not intimate any opinion about whether a particular employee may invoke the privilege against self-incrimination and refuse to fill out the forms.

V.

Because the Union does not seek to support the injunction on the basis of the penumbral rights of privacy, as developed in *Griswold v. Connecticut*[67] and *Roe v. Wade*,[68] apart from its fourth amendment argument, we express no opinion on that issue except to note that even the areas sheltered by such rights are limited by countervailing state interests.[69]

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[64] *Garner v. United States*, 424 U.S. 648, 660-61, 96 S.Ct. 1178, 1185-86, 47 L.Ed.2d 370 (1976).

[65] *Fisher*, 425 U.S. at 410-11, 96 S.Ct. at 1581.

[66] *Maness v. Meyers*, 419 U.S. 449, 474, 95 S.Ct. 584, 599, 42 L.Ed.2d 574 (1975) (White, J., concurring).

[67] 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 1510 (1965).

[68] 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

[69] *Id.* at 153-54, 93 S.Ct. at 727.

VI.

The drug-testing program is not so unreliable as to violate due process of law. While the initial screening test, EMIT, may have too high a rate of false-positive results for the presence of drugs, the union does not dispute the evidence that the follow-up test, GC/MS, is almost always accurate, assuming proper storage, handling, and measurement techniques. Customs also employs elaborate chain-of-custody procedures to minimize the possibility of falsely positive readings. Moreover, the employee may resubmit a specimen pronounced positive to a laboratory of his own choosing for retesting. Finally, the Customs Service program includes a quality-assurance feature. Control samples will be intermingled with those of the employees to measure the incidence of false-positive results. Quality-assurance reports will be provided to the Union. Hence, if the quality-assurance program indicates that false-positive results occur, employees may challenge the validity of their own positive tests on that basis.

We express no opinion concerning the constitutionality of testing applicants for initial employment, none of whom is a party to the suit or represented by the Union.

For these reasons, we VACATE the district court's permanent injunction against the Customs Service's drug screening program both as to applicants for employment and those employees seeking transfer to sensitive jobs, as defined in the present program.

APPENDIX

Cases Involving the Use of Urine Testing For Drugs by Employers

Public Employers

I. Urinalysis is a reasonable search or seizure when a basis exists for individualized suspicion.

Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029,

97 S.Ct. 653, 50 L.Ed.2d 632 (1976) (bus drivers after serious accident or when suspected of using drugs).

Allen v. City of Marietta, 601 F.Supp. 482 (N.D. Ga.1985) (electric line workers who were observed smoking marijuana).

Mack v. United States, No. 85—Civ 5764 (S.D.N.Y. Apr. 21, 1986) (FBI agent suspected of drug use).

II. Urinalysis is a reasonable search or seizure in the absence of individualized suspicion.

McDonell v. Hunter, 809 F.2d 1302 (8th Cir.1987) (prison employees with daily, regular contact with prisoners in medium or maximum security prisons).

Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986) (race horse jockeys).

III. Urinalysis constitutes an unreasonable search or seizure in the absence of individualized suspicion.

Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J.1986) (mass screening of police and firefighters).

Jones v. McKenzie, 628 F.Supp. 1500 (D.D.C.1986) (school bus attendant).

Lovvorn v. Chattanooga, 647 F.Supp. 875 (E.D. Tenn.1986) (all firefighters).

American Federation of Government Employees v. Weinberger, 651 F.Supp. 726 (S.D.Ga.1986) (employees in critical positions with the Army).

Private Employer

Association of Western Pulp and Paper Workers v. Boise Cascade Corp., 644 F.Supp., 183 (D.Or.1986).

ROBERT MADDEN HILL, Circuit Judge, dissenting.

I agree with the majority in Part II of its opinion that compulsory urine testing conducted by the Customs Service (Service) under the drug-testing program challenged here implicates fourth amendment rights. I do not agree, however, that the program is consistent with the requirements of the fourth amendment. My disagreement stems from my conclusion that the program at issue in this case is an ineffective method for achieving the Customs Service's goals, and thus it is an unreasonable invasion of the Customs Service's employees' fourth amendment rights. Therefore, I would hold that this particular program is unconstitutional.

The majority frames its examination of whether the testing program complies with the fourth amendment by questioning whether the search is reasonable. In analyzing this issue, the majority balances the social and governmental need for the testing against the risk that the search will undermine the social order by unduly intruding upon the employee's personal rights of privacy.[1]

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[1] I have some reservations with the method of analysis used by the majority in deciding whether the urine testing feature of the program is reasonable under the fourth amendment. The majority immediately engages in a balancing test, stating that, "While 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.' In certain limited situations, 'the balance of interest precludes insistence upon "some quantum of individualized suspicion."' " Majority opinion at slip opinion 3699, at ——-——, (footnotes omitted). The majority offers no explanation why this case presents a situation where no warrant, no probable cause, nor even any level of suspicion is required, contrary to the language of the fourth amendment.

I doubt whether the majority's analytical starting point is proper in light of the fourth amendment's explicit language. *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause"). I believe, therefore, that some explanation should be made of why

An important weight in this balance is that the means chosen to accomplish the governmental interest must effectively achieve that goal. The majority opinion acknowledges the importance of the effectiveness element. *See* majority opinion, Part III (I) (after stating, "The Union observes that we must also consider the likelihood that the search will be a *sufficiently productive mechanism*' for achieving its purposes, for no privacy invasions should be permitted unless some good end is served," the majority goes on to analyze this issue) (footnote omitted) (emphasis added); Part III(D) ("Government employees may be subject to searches or

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the warrant and probable cause requirement expressed in the fourth amendment should not be applied in this case, or at least why no level of suspicion is required. *Cf. New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 748, 83 L.Ed.2d 720, 741 (1985) (Blackmun, J. concurring) ("I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable Cause Clause, only when we are confronted with 'a special law enforcement need for greater flexibility.' . . . Only in those special circumstances . . . is a court entitled to substitute its balancing of interests for that of the Framers."). The usual fourth amendment analysis has centered on whether the authorities had a warrant, or, if not, whether they fit within an exception to the warrant requirement, and whether they had probable cause. *See T.L.O.*, 469 U.S. at 354-55, 105 S.Ct. at 750-51, 83 L.Ed.2d at 743. (Brennan, J., concurring in part and dissenting in part). Even in the cases in which the Supreme Court has determined that neither a warrant nor probable cause is required, it typically does set forth its reasons for such a determination. *See, e.g., O'Connor v. Ortega*, —— U.S. ————, 107 S.Ct. 1492, 1498-1502, 94 L.Ed.2d ———— (1987) (discussing why no warrant is required and why probable cause is an inappropriate standard for public employer searches of their employees' offices). *But see Bell v. Wolfish*, 441 U.S. 520, 558-60, 99 S.Ct. 1861, 1884-85, 60 L.Ed.2d 447, 481-82 (1979) (concluding that body-cavity searches of prison inmates can be conducted in the absence of probable cause without explaining why neither a warrant nor probable cause was required). I do not now engage in such an analysis because even assuming without deciding that reasonable suspicion is not required, my conclusion that the drug-testing program is not reasonable due to its ineffectiveness makes a discussion of that issue unnecessary.

other restraints on their liberties that would be impermissible in the absence of the employment relationship so long as these requirements *are reasonably aimed* at assuring integrity and competence.") (footnote omitted) (emphasis added). I recognize that the effectiveness factor arises in only two instances in the majority's opinion, and that there are numerous other factors involved in the balance. However, I believe it is the most important factor, and I read the majority's opinion as also recognizing its preeminence.

The Supreme Court likewise has pointed out that an important factor in deciding if the government intrusion is reasonable is whether the measures adopted will achieve the objectives of the search. *See, e.g., T.L.O.*, 469 U.S. at 337, 105 S.Ct. at 741, 83 L.Ed.2d at 732 (the Court must balance privacy expectations against "the government's need for *effective* methods to deal with breaches of public order") (emphasis added); *T.L.O.*, 469 U.S. at 342, 105 S.Ct. at 744, 83 L.Ed.2d at 735 ("Such a search will be permissible in its scope when the *measures adopted are reasonably related to the objectives of the search.* . . .") (emphasis added); *Delaware v. Prouse*, 440 U.S. 648, 659, 99 S.Ct. 1391, 1399, 59 L.Ed. 2d 660, 671 (1979) ("The question remains, however, whether in the service of these important ends [the government interests] the discretionary spot check is a *sufficiently productive mechanism* to justify the intrusion upon Fourth Amendment interests. . . .") (emphasis added). Thus, a necessary element in order to have a reasonable drug-testing program under the fourth amendment is a program that will achieve its objectives, i.e., an effective program.

I believe that the present program is ineffective in the accomplishment of its goals for three basic reasons. First, customs agents that are currently employed in sensitive positions are not tested. Thus, a substantial amount of the current work-force would not be sub-

jected to testing. Although perhaps in the future under the program most of the employees in sensitive positions will have been tested, we are examining the effectiveness of the program at this time. Second, once a tested employee is accepted into a covered position, he is never tested again. It could easily be the case that this "clean" employee will later succumb to the temptation of the use of drugs without being detected. Finally, and most importantly, employees given a five day notification of a test date need only abstain from drug use to prevent being identified as a user. The majority, however, points out that an addict may not be able to abstain for five days. However, it would seem that a person so addicted will be identified as a drug user without the need for a urine test. Also, the majority states that a drug user still faces a significant risk that his test would be positive and therefore he may be deterred from seeking a more sensitive position. However, he also could postpone applying for a sensitive position until he is sure that there is no possibility of detection.[2] In sum, in my opinion the Service's program is ineffective in accomplishing the goals it purportedly seeks to accomplish.

Since I do not believe that the program here achieves its sought after goal, I find it is unreasonable and thus violative of the fourth amendment. I see no reason to

[2] The Service, in response to the question by the court, "How easily can a drug user avoid detection by abstaining from drug use five days before the urinalysis?", stated that it would remove the five-day notification provision from the testing program. Even assuming that at this point in the appeal the Service can alter the testing program, such a change would not affect my conclusion that the program is ineffective. The potential employee merely has to abstain from drug use for a short period prior to applying for a sensitive position. Then, any testing would be negative, and after being accepted, the employee could resume using drugs with no potential for being discovered as a drug user.

allow this invasion of the employees' fourth amendment rights without some concomitant benefit to society.[3]

For these reasons, I respectfully dissent from the majority opinion.

[3] I recognize that my views can be seen as advocating a more intrusive and more far-reaching drug-testing program. I emphasize, however, that I do not mean to imply that I would necessarily find such a program constitutional. Such a program will also have to be examined on its own merits.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3833

USDC #CA 86-3522 C

NATIONAL TREASURY EMPLOYEES UNION and
ARGENT ACOSTA, President, Chapter 168,
National Treasury Employees Union,
Plaintiffs-Appellees,

versus

WILLIAM VON RAAB, Commissioner,
United States Custom Service,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

[Filed May 12, 1987]

Before EDWARDS *, RUBIN and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion for a stay of this court's April 22, 1987 judgment, pending application for a writ of certiorari is DENIED. The Clerk is directed to issue the mandate forthwith.

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* Of the Sixth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3833

NATIONAL TREASURY EMPLOYEES UNION and
ARGENT ACOSTA, President, Chapter 168,
National Treasury Employees Union,
Plaintiffs-Appellees,

v.

WILLIAM VON RAAB, Commissioner,
United States Custom Service,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

(January 14, 1987)

Before RUBIN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

This action was commenced on August 12, 1986, by the National Treasury Employees Union and an employee of the United States Customs Service seeking declaratory and injunctive relief against implementation of the Customs Service's "plan to require its current employees to submit to mandatory collection of their urine to screen

for the use of illegal drugs as a condition of obtaining promotions and advancement in their careers."[1] Complaint for Declaratory and Injunctive Relief at 1-2. Under the drug testing program, persons tentatively selected for positions that (1) directly involve drug interdiction, (2) require the carrying of firearms, or (3) involve access to classified information, are required to submit to urinalysis. Final selection and placement into one of the covered positions are contingent upon successful completion of drug screening through urinalysis.[2]

On October 27, 1986, plaintiffs moved for a preliminary injunction "suspending Customs' urine collection and analysis program, pending final disposition of this complaint." On November 14, 1986, the district court, finding that "numerous constitutional infirmities" plagued the Customs Service's drug testing program,[3] permanently enjoined the program[4] and granted a declaratory judgment that the program was unconstitutional.

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[1] The plan was outlined in the "Drug Screening Program" Customs Directive issued on August 4, 1986 with an effective date of August 11, 1986 ("Customs Directive of August 4, 1986").

[2] The Customs Directive detailing the drug testing plan states that "[d]rug screening is required for any change in position, and any competitive staffing action, when such action would result in placement in a position covered by the program." Customs Directive of August 4, 1986 at 2. Current incumbents of covered positions are not subject to drug testing. A covered position comes under the drug screening program only as it becomes vacant, at which point the tentative selectee is subject to drug screening. *Id.* Accordingly, both Customs' employees selected for promotion or placement to a covered position and applicants for a covered position who apply from outside the Customs Service are subject to drug testing.

[3] The court found, among other things, that the drug testing plan was violative of the fourth amendment, the "penumbral rights of privacy," and of due process.

[4] The Customs Service was enjoined from conducting urinalysis drug testing in the absence of probable cause. *National Treasury Employees Union & Argent Acosta v. Rubb*, No. 86-3522, slip op. at 27 (E.D. La. Nov. 14, 1986).

On November 21, 1986, the Customs Service filed a notice of appeal of the district court's judgment and moved in the district court for a stay pending appeal. The district court denied the stay request on December 3, 1986.

The Customs Service has come to this court seeking an expedited appeal and a stay pending appeal; briefing was completed and the motions submitted on December 30, 1986. We granted the Customs Service's motion for an expedited appeal and have scheduled oral argument for the week of February 2, 1987. For the reasons set forth below, we deny the motion for a stay pending appeal, subject to its reconsideration by the panel hearing oral argument in this case.

In order to obtain a stay pending appeal the moving party must demonstrate: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not granted; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would serve the public interest. *See, e.g., United States v. Baylor University Medical Center*, 711 F.2d 38, 39 (5th Cir. 1983), *cert. denied*, 469 U.S. 1189 (1985). However, this court has not applied these factors in a rigid, mechanical fashion. *See Baylor University Medical Center*, 711 F.2d at 39. "Indeed, in *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981), this Court held that the movant 'need only present a substantial case on the merits when a serious legal question is invoked and show that the balance of equities weighs heavily in favor of granting the stay.'" *Baylor University Medical Center*, 711 F.2d at 39 (citing *Ruiz*, 650 F.2d at 565).

We note first that the legal questions presented by this case are serious questions of substantial import to the Customs Service and its employees and to the citizens of this country. Further, the Customs Service has presented a substantial case on the merits.

Balanced against the facts that serious legal questions are presented by this case and that the Customs Service has presented a substantial case on the merits are the equities. Bearing on the equities are two different considerations. First, as the government states, "[t]his appeal presents questions of first impression for this Court . . . ." Brief for Appellant and Memorandum in Support of Motion for Stay Pending Appeal at i. The government further emphasizes "the unsettled state of the law and the complexity of the constitutional issues presented." *Id.* The correctness of the government's view is amply evidenced by the diverse analyses applied and divergent conclusions drawn by the many courts that have been confronted with the same or similar questions.[3]

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[3] *See, e.g., Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) (finding that administrative search exception to fourth amendment warrant requirement applied to urine testing by racing commission of plaintiff jockeys in heavily regulated racing industry since the state had strong interest in assuring public of integrity of persons engaged in racing industry and since regulation of the industry had reduced the justifiable privacy expectation of those engaged in it), *cert. denied*, 107 S.Ct. 577 (1986); *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264 (7th Cir.) (finding no fourth amendment violation in urine testing of bus drivers who were involved in "serious accidents" or suspected of being under influence of drugs or alcohol because, in view of transit authority's paramount interest in protecting public by ensuring bus operators' fitness to perform jobs, plaintiff bus drivers had no reasonable expectation of privacy with respect to submitting to urinalysis and further, because conditions of testing were reasonable), *cert. denied*, 429 U.S. 1029 (1976); *American Federation of Government Employees, AFL-CIO v. Weinberger*, No. CV486-353 (S.D. Ga. Dec. 2, 1986) (determining that in light of fourth amendment considerations, plaintiffs were entitled to injunctive relief against periodic drug testing of civilian employees occupying "critical" positions with Department of Army; "reasonable suspicion" standard applies); *Lovvorn v. City of Chattanooga*, No. CIV-1-86-389 (E.D. Tenn. Nov. 13, 1986) (finding that drug testing by urinalysis of all firefighters is violative of fourth amendment because "reasonable suspicion" on which testing could be based could not be said to exist and rejecting city's suggestion that court carve

Second, the circumstances that have attended the implementation and subsequent suspension of the Customs Service's drug testing program, in combination with the imminence of oral argument, militate against the grant-

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out exception to reasonable suspicion requirement akin to administrative search exception because clearly defined standards to protect an individual's privacy expectation that exist in administrative search cases were absent in this case); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (finding mass urine testing of fire and police department employees unreasonable and thus, violative of fourth amendment because there was high degree of intrusion, no safeguard of confidentiality, plaintiffs had reasonable expectation of privacy, and there was no individualized basis or even general job related basis for instituting mass urinalysis; under fourth amendment, urinalysis can be required only on basis of "reasonable suspicion" which "requires individualized suspicion, specifically directed to the person who is targeted for the search."); *Mack v. United States*, No. 86-Civ.-5764 (S.D.N.Y. Apr. 21, 1986) (determining that urinalysis of FBI agent suspected of drug use did not violate fourth amendment because collecting urine is minimally intrusive, this search was not conducted in public view, plaintiff had a diminished privacy expectation as an FBI agent, and FBI has far more compelling interest in having drug-free employees than do other employers because drug involvement of FBI employee jeopardizes national security); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986) (finding fourth amendment violation in drug testing of plaintiff school bus attendant pursuant to drug testing program initiated as result of increase in traffic accidents and absenteeism and discovery of syringes in restrooms used by transportation employees because there was no probable cause and defendants had no particularized reason to believe plaintiff was a drug user; plaintiff had reasonable expectation of privacy from search which is not, in case of the school bus attendant, outweighed by public safety considerations); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985) (finding fourth amendment violation in urinalysis drug testing of corrections department employees and concluding that fourth amendment allows government to conduct urinalysis "only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience that the employee is then under the influence of alcoholic beverages or controlled substances;" possibility of discovering drug use by employees is too attenuated to make testing constitutionally reasonable); *Allen v. City of Marietta*, 601

ing of a stay at this particular juncture. The drug testing program was in place for three months before it was enjoined. The program has been stayed by the district court's order for two months. To prevent the Customs Service from reinstituting its drug testing program for another three weeks is not, in our view, hardship sufficient to warrant our action when plenary consideration of the motion can be afforded by the oral argument panel concurrently with its consideration of the merits of this case. There is, of course, always the possibility that any order that this panel might enter today, based on its conclusions about the factors governing the issuance of a stay, might be superseded by a contrary decision of the oral argument panel. An on-again, off-again approach to the Customs Service's drug testing program is certainly not in the public's interest, at least not when the lapse of three weeks may eliminate further undesirable turmoil.

We therefore deny the stay, subject to its full reconsideration by the panel hearing the merits of this case.

F. Supp. 482 (N.D. Ga. 1985) (finding no fourth amendment violation in urinalysis drug testing of "electrical" workers suspected of drug use because although government employees do not surrender their fourth amendment rights by virtue of government employment, government has same right as private employer to oversee its employees and investigate potential misconduct relevant to employee's performance of duties and therefore, employee cannot claim legitimate expectation of privacy from searches of that nature; here, tests were administered in employment context as part of government's legitimate inquiry into drug use by employees rather than for law enforcement purposes).

HIGGINBOTHAM, Circuit Judge, specially concurring:

I join in the denial of a stay for the sole reason that a panel will hear oral argument in this case in three weeks, and we do no more than delay full consideration of the application for a stay until that argument. Even so, it bears emphasis that the basis for the district court's ruling is, at best, problematic.

I

As the record demonstrates, and as the whole nation knows, traffic in illegal drugs with its enormous destruction of life is a national problem. Congress recently responded in a manner not unlike a response to a military threat, appropriating over $1 billion (an increase of 26.4% from the last fiscal year) to the Customs Service for fiscal year 1987 with funding for 1000 additional Customs Service personnel. This means that, with turnover, the Customs Service must recruit 3,000 new employees, and most hiring will be for sensitive positions of trust.

The Customs Service requires drug screening for applicants tentatively selected for positions that (1) directly involve drug interdiction, (2) require the carrying of firearms, or (3) involve access to classified information. No screening of incumbents or applicants for other positions is required. All plaintiffs in this case are applicants who assert a constitutional right to be considered for the three categories of sensitive jobs without a test conceded to be 100% accurate in proving that they are not themselves users of drugs. It is undisputed that applicants for the sensitive positions requiring the screening are given notice that they will be asked to furnish a urine sample, may withdraw their application for the sensitive job, and are allowed to provide the sample in the privacy of a closed bathroom stall after removing outer garments in which a false sample or adulterating agent might be hidden. The enjoined threatened deprivations of consti-

:utional right are said to be of rights of privacy, rights :o be free of self-incrimination, and due process.

II

The precise privacy interest asserted is elusive, and the plaintiffs are, at best, inexact as to just what that privacy interest is. Finding an objectively reasonable expectation of privacy in urine, a waste product, contains inherent contraditions. The district court found such a right of privacy, but, in fairness, plaintiffs do not rest there. Rather, it appears from the plaintiffs' brief that it is the manner of taking the samples that is said to invade privacy, because outer garments in which a false sample might be hidden must be removed and a person of the same sex remains outside a stall while the applicant urinates. Yet, apart from the partial disrobing (apparently not independently challenged) persons using public toilet facilities experience a similar lack of privacy. The right must then be a perceived indignity in the whole process, a perceived affront to personal identity by the presence in the same room of another while engaging in a private body function.

It is suggested that the testing program rests on a generalized lack of trust and not on a developed suspicion of an individual applicant. Necessarily there is a plain implication that an applicant is part of a group that, given the demands of the job, cannot be trusted to be truthful about drug use. The difficulty is that just such distrust, or equally accurate, care, is behind every background check and every security check; indeed the information gained in tests of urine is not different from that disclosed in medical records, for which consent to examine is a routine part of applications for many sensitive government posts. In short, given the practice of testing and background checks required for so many government jobs, whether any expectations of privacy by these job applicants were objectively reasonable is dubious

at best. Certainly, to ride with the cops one ought to expect inquiry, and by the surest means, into whether he is a robber.

Finally, reliance upon penumbral rights of privacy adds nothing. The content and dimension of such rights are difficult to define, at best. At the least, we know that such rights of privacy have been largely confined to matters of family such as "child rearing and education," "family relationships," "procreation," "marriage," "contraception" and "abortion," as well as the "right to decide whether or not to beget or bear a child." *Bowers v. Hardwick*, 106 S.Ct. 2841, 2843-44 (1986) (citations omitted). I recognize that the Supreme Court has also spoken in terms of an "individual's dignitary interests in personal privacy and bodily integrity." *Winston v. Lee*, 105 S.Ct. 1611, 1617 (1985). But the *Winston* court dealt with an intrusion into the body (surgical removal of a bullet). The court balanced the government's need against the extent of intrusion into the body in a *coercive* environment. Speaking of "dignity interests" out of context is not helpful. Giving the expansive reading claimed for it would implicate testing of intelligence and aptitudes. Many fitness tests would in this broad sense, disclose private matters that are potentially more destructive of "personal dignity"—inquiries, if we succumb to deciding cases by rhetoric, more justifiably called Orwellian than the testing of urine. Surely, the Constitution does not forbid such routine testing for fitness.

III

Reliance upon the fourth amendment suffers from another related problem. There is a substantial question whether requiring the samples as a condition of hire for the three job categories is a search or seizure at all. It seems odd to think of a government agent as "seizing" urine by requiring the sample as a condition to consideration for a sensitive job applied for with full notice of the requirement. But it is argued, government may not require a waiver of constitutional rights as a condi-

tion of employment. Again, such an abstraction sheds little light on this problem; it begs the question of what right. If the government has the right to insist upon proof that its policemen of drug dealers not be drug users, and surely it does, the reasonableness of any invasion of right and the correlative reasonableness of the expectation of privacy is a function of the relevance of the job requirement to the job to be done. Certainly it is permissible, even essential, that persons selected for these jobs not be users of illegal drugs. The decision by the executive branch that this testing is necessary protection of its interest is entitled to some deference and I find no record basis here for a substitution of judicial judgment.

The government, as an employer, is different from a private employer, of course, but not in all respects. *See Connick v. Myers*, 103 S.Ct. 1684 (1983). An anarchist's political view is protected by the first amendment. But I would not suppose that his constitutional protection extends to the right to be an FBI agent. The point is that the government's interest as an employer in fit employees may allow it to deny employment when it cannot as a sovereign attack other consequences to the protected view.

Courts have sustained drug screening for railroad employees, *Brotherhood of Maintenance v. Burlington N. R.R.*, 802 F.2d 1016, 1023 (8th Cir. 1986), sustained urinalysis drug testing for jockeys, *Shoemaker v. Handel*, 795 F.2d 1136, 1142-43 (3d Cir.), *cert. denied*, 107 S.Ct. 577 (1986) (when jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry); sustained requirements that participants in AFDC programs submit to home visits by Welfare Workers, *Wyman v. James*, 400 U.S. 309, 326 (1971); sustained pre-boarding inspection of airline passengers, *United States v. Skipwith*, 482 F.2d 1272, 1276-77 (5th Cir. 1973). Nor does the fourth amendment prohibit the government from insisting that its contractors consent to searches. *Zap v. United States*,

328 U.S. 624, 628 (1946), *vacated on other grounds*, 330 U.S. 800 (1947).

IV

The district court, apparently sua sponte, also concluded that the proposed drug screening would violate the self-incrimination and due process clauses of the fifth amendment. To the extent the district court's opinion found a violation of the privilege against self-incrimination, it was in error. The privilege protects an accused only from being compelled to testify against himself, or to provide "evidence of a testimonial or communication nature." If withdrawing blood does not violate the fifth amendment, *Schmerber v. California*, 384 U.S. 757, 761 (1966), the sampling of urine would seem to be a fortiori an easier case.

The district court found, and it appears to have been without any suggestion by plaintiffs below, that the tests were so unreliable as to deny applicants due process of law. No court has ever held that the combination of tests used here denies due process. The conclusion is either without record basis or is directed toward the possibility of errors by the laboratories such as an error in identifying a specimen. Such risk is present in most laboratory evidence. Finally, and apart from the fact that the evidence of reliability points to the opposite conclusion, the district court overlooked the procedure in place that allows an applicant who disagrees with test results to have the sample tested by another laboratory.

V

The district court has shut down the hiring of persons found by Congress to be necessary to combat the illegal importation of drugs. I do not lightly discount the considered judgment of a district judge and my concerns respond to the submissions of the parties made in an emergency application for stay and without the benefit of oral argument. Perhaps more will be developed, but I remain profoundly skeptical.

MINUTE ENTRY
November 14, 1986
COLLINS, J.

Civil Action No. 86-3522

SECTION "C"

NATIONAL TREASURY EMPLOYEES UNION
and ARGENT ACOSTA

versus

WILLIAM VON RAAB, Commissioner,
United States Customs Service

The Court is presented with a Motion by the defendant to Dismiss this action on the grounds that: (1) venue does not lie in this District; (2) plaintiffs lack standing to bring this action; (3) this Court lacks jurisdiction over this dispute; and (4) plaintiffs have failed to state a claim upon which relief may be granted. Plaintiffs oppose the Motion to Dismiss and have moved for preliminary injunctive relief. With the concurrence of all parties, pursuant to Rule 65(a)(2), the Court has consolidated hearing on the Motion for Preliminary Injunctive Relief with Trial on the Merits. The parties filed numerous exhibits into the record, but did not call any live witnesses. The parties agreed that no contested facts were presented. Accordingly, the Court makes its findings based upon the uncontroverted facts and exhibits filed into the record.

For reasons set forth below, the Court finds that venue is proper in the Eastern District of Louisiana, that the plaintiffs have standing to bring this action, that jurisdiction is properly vested in federal district court, and that plaintiffs have stated a valid claim for relief. The Court finds that the drug testing plan at issue violates numerous provisions of the United States Constitution and

must be enjoined and declared unconstitutional. Accordingly, the Motion to Dismiss is DENIED, and the Petition for Injunctive and Declaratory Relief is GRANTED.

The Drug Testing Plan

This action has been brought in federal district court seeking an injunction to block the United States Customs Service from further urine collection and analysis as a part of a "drug-testing" program implemented on July 21, 1986. The drug testing plan requires that United States Customs Service workers who seek promotion into certain enumerated "covered positions" submit to drug screening through analysis of their urine. "Drug screening through urinalysis is a condition of employment for placement into positions covered by the program." Customs Directive on Drug Screening Program, Plaintiffs' Exhibit No. 1 at 1. Customs employees who test positive through drug screening "are subject to loss of consideration for the position applied for . . . [and] . . . are subject to removal from the service." Plaintiffs' Exhibit No. 1 at 11. Any tentative selectee for the promotion who refuses to undergo drug screening "will lose consideration for that position." Plaintiffs' Exhibit No. 1 at 11. Urine samples are tested by using immunoassay as well as gas chromatography/mass spectrometry techniques. Plaintiffs' Exhibit No. 1 at 3. A collector is actually physically present in the lavoratory during the urination process, though observation is supposed to be "close but not 'direct.'" Plaintiffs' Exhibit No. 1 at 6. One Customs worker who has already been tested described the procedure as follows: "The laboratory representative accompanied each of us into the restroom, one by one. He placed some dye into the urinal and then stepped behind a partition. The representative was able to observe me from my shoulders up from behind the partition while I urinated into the sample jar." Affidavit of Lee Cruz, Plaintiffs' Exhibit No. 5 at 3. Prior to voiding into the sample jar, subjects are required to fill

out a pre-test form stating medications taken within the last thirty days and any circumstances in which the subject may have been in contact with illegal substances over the last thirty days. Plaintiffs' Exhibit No. 1 at 5.

Having discussed the drug testing plan at issue, the Court will now focus on defendant's Motion to Dismiss.

Venue Lies In The Eastern District Of Louisiana

Venue is proper in the Eastern District of Louisiana. Under Title 28 United States Code section 1391(e), "A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity . . . may, except as otherwise provided by law, be brought in any judicial district in which . . . (2) the cause of action arose, or . . . (4) the plaintiff resides if no real property is involved in the action." Both subsections support venue in this District. The Fifth Circuit has held that a cause of action can arise in several forums for purposes of venue, and that "the court should not oppose the plaintiff's choice of venue if the activities that transpired in the district where suit is brought were not insubstantial and the forum is a convenient one, balancing the equities and fairness to each party." *Florida Nursing Home Association v. Page*, 616 F.2d 1355, 1361 (5th Cir.), *cert. denied* (as to venue issue), 449 U.S. 872 (1980), *rev'd on other grounds*, 450 U.S. 147 (1981). The Customs Service houses its headquarters for the entire South Central Region in New Orleans. Hundreds of Customs employees are located in the Eastern District of Louisiana. Employees from this District will be required to take drug tests here to receive promotions to covered positions. Activities that will transpire in this District where the suit has been brought are not insubstantial. The Court rejects defendant's restrictive notion that the only forum in which the drug testing plan may be challenged is Washington, D.C. While the Customs Directive may have been conceived and drafted in Washington, D.C., the great bulk of Customs employees who are subject to the program are outside of Washington, D.C. and will be tested outside of Washington, D.C. Activities in the Eastern District of Louisiana contemplated under the drug testing plan are substantial.

The defendant has failed to cite a single factor that makes this an inconvenient forum. The United States has attorneys all over the country, including the Eastern District of Louisiana. While Customs is disappointed that plaintiff, National Treasury Employees Union (NTEU), exercised its unqualified right under Federal Rule of Civil Procedure 41(a)(1)(i) to voluntarily dismiss an earlier action it brought in the District of Columbia before answer was filed, Customs could have prevented this by filing an answer before the NTEU had an opportunity to voluntarily dismiss. By choosing to exercise its right under Fed. R. Civ. P. 12(a) to delay as long as 60 days before answering, the defendant lost an opportunity to prevent a voluntary dismissal of plaintiff NTEU's action brought in Washington, D.C. Having chosen to delay the filing of an answer, the defendant cannot now complain that plaintiff exercised its right to voluntarily dismiss in Washington, D.C. before issue was joined, and to refile in the Eastern District of Louisiana.

Venue also lies in the Eastern District of Louisiana under Title 28 United States Code section 1391(e)(4) because "the plaintiff resides" in this District. There are two plaintiffs in this action: the National Treasury Employees Union and Argent Acosta. Plaintiff Argent Acosta, President of NTEU Local 168 (which has its office in New Orleans) is a resident of this District, as are most of the employees he represents in this action. Moreover, at least one court has held that a labor organization "resides" wherever its individual members are for purposes of Section 1391(e)(4). *Columbia Power Trades Council v. U.S. Department of Energy*, 496 F. Supp. 186, 189 (W.D. Wash. 1980), *rev'd on other*

grounds, 671 F.2d 325 (9th Cir. 1982). Finally, even if NTEU proper did not "reside" in this District, numerous courts that have considered the issue have concluded that Section 1391(e)(4) does not require *all* the plaintiffs to reside in the forum, but only one. Section 1391(e)(4) permits an action to be brought against the federal government by plaintiffs from more than one district, in any district in which at least one of the plaintiffs resides. *Exxon Corporation v. FTC*, 588 F.2d 895, 898-99 (3d Cir. 1978); *Santa Fe International Corp. v. Watt*, 580 F. Supp. 27, 29 & n.4 (D. Del. 1984); *Dow Chemical v. Consumer Product Safety Commission*, 459 F. Supp. 378, 384, n.4 (W.D. La. 1978). The court concludes that venue lies in the Eastern District of Louisiana under both Sections 1301(e)(2) and (e)(4) of Title 28 United States Code.

The National Treasury Employees Union Has Standing To Bring This Action

In its brief in support of its Motion to Dismiss, the defendant contended that the NTEU lacked standing to bring the instant lawsuit on behalf of its members. Although the defendant conceded the standing issue at oral arguments, the Court addresses it nevertheless.

A very recent Opinion of the United States Supreme Court compels the finding that the NTEU has standing to bring this action. *International Union, United Automobile Aerospace, and Agricultural Implement Workers of America v. Brock*, 54 LW 4764 (August 19, 1986), held that a union whose members claimed that they were eligible for benefits under the 1974 Trade Act has standing to bring a federal court lawsuit on behalf of the members challenging the secretary's interpretation. The Supreme Court applied the three-part test from *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977). *Hunt* held that an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own

right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. In the instant litigation, individual NTEU members would otherwise have standing to sue in their own right. The interests the NTEU seeks to protect are germane to the organization's purpose, namely, protecting union members from degradation, harm, humiliation and loss of promotions or jobs. Neither the claim asserted by the NTEU, that the drug testing plan violates constitutional protections, nor the type relief requested, a permanent injunction, requires the participation of individual members in the lawsuit. Applying *Brock* and *Hunt* to the facts of this case, the Court concludes that the NTEU has standing to object to the drug testing program.

The Court Has Jurisdiction Over This Dispute

The defendant's next argument in favor of dismissal is that this Court lacks jurisdiction to entertain this dispute. Defendant contends that this action must be resolved according to the Civil Service Reform Act (CSRA), which precludes district court jurisdiction over federal labor relations disputes.

According to the defendant, the testing program constitutes a new "condition of employment." It is the defendant's position that the plaintiffs must, therefore, attempt to characterize the program as a "negotiable" employment practice with the Federal Labor Relations Authority (FLRA), and raise their labor practice challenges to the program before that administrative tribunal. The defendant contends that plaintiffs' constitutional challenges to the program will eventually receive Article III review because the plaintiffs are entitled to appeal any final FLRA decision to the appropriate Circuit Court of Appeals.

In addition to establishing the FLRA framework for resolving labor relations disputes, the defendant argues that the CSRA sets out the exclusive comprehensive process for resolving personnel claims of federal employees in the Merit Service Protection Board (MSPB) scheme. The defendant contends that if an employee, subjected to drug testing, is denied a promotion or suffers any other "adverse action," see 5 U.S.C. § 7512, he may appeal that agency decision to the MSPB. Therefore, the defendants conclude, the MSPB alone may hear the type of personnel challenges the plaintiffs have presented to this Court in regard to the testing program.

The Court finds that the plaintiffs' claim for injunctive and declaratory relief is not cognizable under this broad administrative scheme of the CSRA, but rather is properly brought directly in federal district court.

The starting point for an analysis of the preclusive effect of the CSRA is the landmark Opinion of *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983). *Bush* involved an action brought by an aerospace engineer against the director of a federal space flight center to recover for alleged defamation and an alleged retaliatory demotion. The Supreme Court held that because the engineer's claims arose out of an employment relationship that was governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, it would be inappropriate for the Court to supplement that regulatory scheme with a new nonstatutory damages remedy. The defendant to the instant litigation contends that *Bush v. Lucas* requires dismissal for lack of jurisdiction. This Court disagrees. A close reading of *Bush* reveals that this Court has jurisdiction to grant the relief requested.

The critical language in *Bush* is as follows:

> Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies.[28]

[28] Not all personnel actions are covered by this system. For example, there are no provisions for appeal of either suspensions for 14 days or less, 5 U.S.C. § 7503 (1982 ed), or adverse actions against probationary employees, § 7511. *In addition, certain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme.*"

Bush v. Lucas, 103 S. Ct. at 2415 (emphasis added).

It is evident that warrantless searches do not constitute "personnel actions" within the statutory scheme into which defendant seeks to relegate NTEU. As discussed *infra*, this Court finds that examination of Customs workers' urine constitutes a warrantless search. Therefore, a claim for injunctive relief to block urinalysis is not covered under the CSRA. Accordingly, this Court is not deprived of jurisdiction by virtue of the CSRA.

The Court is unimpressed with defendant's attempt to distinguish footnote 28 of *Bush* as being limited to actions by "supervisors." Defendant's logic would lead this Court to the absurd result that an aggrieved Customs worker could sue his immediate supervisor for a warrantless search, but could not sue the ultimate supervisor, Commissioner Von Raab. It would be pointless to require plaintiffs to amend their suit to name each individual supervisor that would be in charge of drug testing at each location across the country. It is much more rational and judicially economical to name the head of the agency as the party defendant. Moreover, footnote 28 discussed actions by "supervisors" because *Bush v. Lucas* involved a suit by a federal employee against his

supervisor. The Court rejects defendant's contention that footnote 28 is somehow limited to *ultra vires* actions by supervisors. Nothing in the footnote supports such a tortured reading, and this Court refuses to so limit the scope of footnote 28.

Aside from *Bush*, defendant relies primarily upon *National Federation of Federal Employees, et al. v. Weinberger, et al.*, 640 F. Supp. 642 (D.D.C. 1986) (hereinafter referred to as *NFFE*). In that case, Judge Hogan granted a motion to dismiss a claim that challenged drug testing procedures employed by the military. Although Judge Hogan placed great weight on the language in *Bush* discussed *supra*, he failed to discuss the critical *Bush* footnote 28. The rationale of *NFFE* is completely undercut by *Bush* footnote 28. Since warrantless searches are not personnel actions within the statutory scheme, the preclusive effect of the CSRA does not operate to deprive plaintiffs of the right to seek injunctive relief in federal district court. This Court is unpersuaded by the *NFFE* decision, since that case ignores a crucial point of law raised in *Bush v. Lucas*.

Another reason why *Bush* and its progeny do not persuade this Court that it lacks jurisdiction is because plaintiffs to the instant litigation do not seek creation of a new judicial remedy, as was the case in *Bush*. As Justice Stevens pointed out in *Bush*: "Petitioner asks us to authorize a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors." 103 S. Ct. at 2406. Here, plaintiffs seek to invoke this Court's historic equitable powers to enjoin the defendant from engaging in unconstitutional activity. Plaintiffs are not seeking damages for drug tests that have already taken place. This Court does not now rule on the issue of whether it would have jurisdiction to entertain a suit for damages sustained as a result of Customs' drug screening plan. This Court merely holds that it has jurisdiction to grant equitable

relief to Customs workers seeking to enjoin an unconstitutional program of warrantless searches.

It would be absurd for this Court to hold that plaintiffs must submit to unconstitutional programs established by the defendant, then seek damages under the CSRA. The more sensible approach is to enjoin the activity in the first place. Indeed, persons who test negative for drugs will have little likelihood of success in the CSRA framework since Customs would not take adverse action against such employees upon a negative test result. Yet, the employees would have been subjected to an unconstitutional search. This issue is discussed in the *NFFE* decision:

> With respect to the MSPB procedures at issue, if an individual Aberdeen employee either refuses to be tested or tests positively for drug use in both field and confirmation tests, and the Army takes 'adverse action' against him as that term is used in the CSRA, he may raise constitutional and statutory challenges to the testing program in MSPB proceedings. See 5 U.S.C. § 7703(B)(1) . . .
>
> If agency action is taken against a civilian employee that cannot be characterized within the framework of the CSRA as 'adverse,' so that the employee does not have an available avenue of relief to the MSPB, it appears that nothing would prevent the employee from bringing a Bivens-type action against the individuals who ordered or supervised his drug testing: in short, 'effective remediation' for alleged constitutional deprivations could not 'conceivably' be achieved through the administrative process. *Daly*, 661 F.2d at 963.

NFFE, 640 F. Supp. at 654.

Under the *NFFE* approach, the district court should decline to entertain complaints for injunctive relief to

prevent a constitutional violation, but should exercise jurisdiction over certain claims seeking damages for the constitutional violations. This approach is irrational. Rather than forcing the plaintiffs to submit to an unconstitutional program then seek damages in court, this Court will exercise jurisdiction over the Petition for Declaratory and Injunctive Relief.

Turning to the merits of the Petition for Declaratory and Injunctive Relief, the Court finds numerous constitutional infirmities that compel this Court to grant the injunctive and declaratory relief requested.

The Drug Testing Plan Violates
The Fourth Amendment

Testing of Customs workers' urine pursuant to the Customs Directive constitutes a full-blown search within the meaning of the Fourth Amendment to the United States Constitution. *See Capua v. City of Plainfield*, Slip Op. No. 86-2992 (D.N.J. Sept. 18, 1986); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); *McDonell v. Hunter*, 612 F. Supp. 1122 (D.C. Iowa 1985). Drug testing of Customs workers' bodily wastes is even more intrusive than a search of a home. When analyzing urine specimens, the defendant is searching for evidence of illicit drug usage. The drug testing plan is no minor frisk or pat-down. It is rather a full-scale search that triggers application of Fourth Amendment protections.

The mandatory collecting of urine samples pursuant to the drug testing plan constitutes a seizure within the meaning of the Fourth Amendment. *McDonell v. Hunter*, 612 F. Supp. 1122 (D.C. Iowa 1985). Indeed, the urine is seized from the Customs workers in that they must hand over a jar of their bodily wastes for analysis by the defendant.

Even *Schmerber v. State of California*, 384 U.S. 757, 86 S. Ct. 853 (1966), cited by defendant and discussed

infra in connection with violations of the Fifth Amendment, held that blood testing for the presence of alcohol "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." 86 S. Ct. at 1834. The Supreme Court noted that the Fourth Amendment "expressly provides that '[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches shall not be violated . . .'" (emphasis in text of *Schmerber*). *Id.* The Supreme Court went on to hold that "it could not reasonably be argued . . . that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons' and depend antecedently upon seizures of 'persons' within the meaning of that Amendment." *Id.* This Court rejects defendant's contention that urinalysis does not involve search and seizure within the meaning of the Fourth Amendment. Quite to the contrary, the Court finds that the drug testing plan falls squarely within the ambit of the Fourth Amendment. Testing of urine, like the testing of blood, is a full-blown search and seizure.

Under the Customs Directive at issue, the searches and seizures are to be made in the total absence of probable cause or even reasonable suspicion. The plan does not call simply for the testing of those whom the defendant reasonably suspects of using or selling drugs at the work site. Rather, the plan uses a dragnet approach of testing all workers who seek promotion into so-called "covered positions." This dragnet approach, a large-scale program of searches and seizures made without probable cause or even reasonable suspicion, is repugnant to the United States Constitution. In weighing the massive intrusive effect of the drug testing plan against the legitimate governmental interest in a drug-free work place and work force, the Court finds the plan to be overly intrusive and constitutionally infirm. While the goal is legitimate, the means selected by the defendant violate the protections of the Fourth Amendment.

Customs workers have a reasonable expectation of privacy in their urine. *See Capua v. City of Plainfield*, Slip Op. No. 86-2992 (D.N.J. Sept. 18, 1986); *Patchogue-Medford Congress of Teachers v. Board of Education*, Slip. Op. No. 3649 (N.Y. Sp. Ct., App. Div. August 11, 1986); *Caruso v. Ward*, Index No. 12632/86 (N.Y. Sup. Ct., N.Y.C. July 1, 1986). Urination is usually conducted in private, and persons do not normally urinate in public. Indeed, under many municipal ordinances, urination in public is unlawful. Customs workers do not lose an expectation of privacy in their urine merely by reporting to work at a work site supervised by the defendant. The Court notes that excreting body fluids and body wastes is one of the most personal and private human functions. While body fluids and body wastes are normally disposed of by flushing them down a toilet, Customs workers do maintain a legitimate expectation of privacy in their urine until the decision is made to flush the urine down the toilet and the urine is actually flushed down the toilet. The Customs Directive violates a legitimate expectation of privacy held by Customs workers.

This Court agrees with Judge Victor's analysis in *McDonell v. Hunter*, 612 F. Supp. 1122 (D.C. Iowa 1985):

> Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.

McDonnell, 612 F. Supp. at 1127. *See also, Jones v. McKenzie*, 628 F. Supp. 1500, 1508 (D.D.C. 1986) (finding a reasonable expectation of privacy from a search of mandatory urine testing for drugs).

The Court concludes that the drug testing plan constitutes an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy. The searches and seizures are unreasonable and wholly unconstitutional.

It Is Unconstitutional To Condition Public Employment On "Consent" To An Unreasonable Search

The Court rejects defendant's contention that Customs workers who are compelled to submit to urinalysis as a precondition to advancement into so-called "covered positions" have voluntarily waived their constitutional rights. Quite to the contrary, the Court finds that Customs workers who submit to the plan do not and have not done so voluntarily, but give and have given consent as a result of "coercion, express or implied" within the meaning of *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041 (1973).

The Court holds that it is unconstitutional for the government to condition public employment on "consent" to an unreasonable search. The Court refuses to find voluntary "consent" to an unreasonable search where the price of not consenting is loss of government employment or some other government benefit.

This holding, that consent coerced from Customs workers is involuntary, is consistent with the Opinion of the Fifth Circuit in *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1198 (1986). In that case,

a visitor to a prison was obliged to sign a visitor form as a precondition to visiting his two inmate sons. The form purported to waive Fourth Amendment rights. After being subjected to a strip search, the father brought an action challenging the search. The Fifth Circuit held that the trial court did not err in rejecting the Louisiana State Penitentiary's "consent" defense. Following the Fifth Circuit's guidance, this Court holds that purported consent to urinalysis by Customs workers is involuntary and is the result of coercion.

The Drug Testing Plan Violates The Self-Incrimination Clause Of The Fifth Amendment

The Court finds that the drug testing plan would violate the Fifth Amendment protections against self-incrimination. Customs workers who seek promotions are forced to provide bodily excrements to enable the defendant to seek evidence of any illicit drugs the workers may have taken. Additionally, Customs workers are required to fill out a pre-test form stating which medications were taken within the last thirty days and any circumstances where the subject may have been in contact with illegal substances in the last thirty days. This constitutes involuntary self-incrimination which is forbidden under the Fifth Amendment to the United States Constitution.

The Court is cognizant that *Schmerber v. California*, 384 U.S. 757 (1966) held that the privilege against self-incrimination protects an accused only from being compelled to testify against himself, or to provide "evidence of a testimonial or communicative nature." 384 U.S. at 761. The withdrawal of blood in *Schmerber* was held not to involve compulsion to those ends. *Schmerber*, however, is distinguishable from the instant case on numerous grounds. In *Schmerber*, the Supreme Court found that "there was plainly probable cause" to arrest and to charge the defendant, whereas in the instant case the defendant conducts the searches and seizures in the absence of probable cause. The Customs Directive applies to workers who have given no reason to believe they are using drugs and who have furnished no probable cause to justify arrest. Moreover, *Schmerber* involved only the taking of a blood sample, whereas, the Customs Directive requires both a urine sample *and* a pre-test form stating medications taken and any circumstances in which the subject may have been in contact with illegal substances. Taken as a whole then, the Customs Directive calls for "evidence of a testimonial or communicative nature." Finally, *Schmerber* involved the mere drawing and testing of a blood sample, a procedure that in no way detracts from human dignity and self respect. The Customs Directive, on the other hand, requires the presence of an observer in the restroom while a subject performs excretory functions. The observer listens to the bodily fluids being expelled and witnesses the voiding process closely but not directly. This gross invasion of privacy constitutes a degrading procedure that so detracts from human dignity and self respect that it "shocks the conscience" and offends this Court's sense of justice. *Rochin v. California*, 342 U.S. 165 (1952). The Court concludes that the Customs Directive violates the self-incrimination clause of the Fifth Amendment.

The Drug Testing Plan Violates Penumbral Rights Privacy Guaranteed By The United States Constitution

The Court finds that the Customs Directive unconstitutionally interferes with the penumbral rights of privacy held by Customs workers. In *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965), the Supreme Court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . These cases bear witness that the right of privacy . . . is a legitimate one . . . The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Gris-*

wold, 85 S. Ct. at 1681-82. The constitutional right of personal privacy was reiterated by the Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973). There the Court stated: "In a line of decisions . . . going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S. Ct. 100, 1001, 35 L. Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe*, 93 S. Ct. at 726.

The Court finds that the Customs Directive detracts from the dignity of each Customs worker covered under the plan and invades the right of privacy such workers have under the United States Constitution. Excreting bodily wastes is a very personal bodily function normally done in private; it is accompanied by a legitimate expectation of privacy in both the process and the product. The Customs Directive unconstitutionally interferes with the privacy rights of the Customs workers.

The Drug Testing Plan Is So Unreliable As To Violate Due Process Of Law

The Court finds that the drug testing plan is far from an infallible system. Indeed, the affidavit of a Customs worker who has already been tested, Benito D. Juarez, states that the laboratory representative mixed up his sample with that of another Customs worker:

> "After I urinated, I noticed that the laboratory representative was affixing a sticker to my sample bottle. The sticker he was affixing had the wrong social security number on it. He had already filled out the labels before collecting our samples, and apparently he placed Fred Robinson's sticker on my bottle. When I alerted him to his mistake, he went back and checked his papers to determine my social security number and then corrected his error."

Affidavit of Benito D. Juarez, Plaintiffs' Exhibit No. 6 at 3.

The entire process is fraught with the danger of mishaps and false-positive readings. The Affidavit of Dr. Arthur J. McBay, a toxicologist with a Ph.D. in Pharmaceutical Chemistry, describes the dangers:

> The EMIT screen suffers from limitations in its reliability. This test will give a positive result for the tested drug when other prescription and over the counter drugs have been ingested, and may react to food and other substances, including enzymes produced by the body itself. This is because of a phenomonon known as 'cross-reactivity.' The legitimate drugs that have triggered a positive result for marijuana, for example, include the anti-inflammatory drugs ibuprofen, fenoprofen, and naproxen, some of the most widely used drugs in this country. They are sold under the brand names Advil, Motrin, Nuprin, Rufen, Anaprox, Aponaproxen, Naprosyn, Navaonaprox and Nalfon. A number of drugs that are closely related in chemical structure to amphetamines will also test positive, mainly diet and cold preparations containing ephedrine and phenylpropanolamine. These include Nyquil, Contac and other brand names. In addition, the immunoassay tests cannot distinguish between codeine, a legal drug, and heroin. Both are classified opiates.
>
> I am also familiar with the Gas Chromatography/Mass Spectrometry method of urinalysis testing. If conducted properly, the combination of gas chromatography with mass specitrometry can provide a more reliable test for determining the presence of drugs in a urine sample, because it identifies the specific metabolites in urine samples. Positive identification, however, requires strict handling safeguards and procedures which insure that the samples are not exposed to excessive temperatures through the transportation process. The GC/MS test is significantly more expensive to conduct. . .

> All drug testing procedures result in false positives. The reliability of all drug determinations, whether by immunoassay or GC/MS, depend on such factors as the certainty of specimen identification; specimen storage, handling, and preparation; preparation and storage of test reagents; proper cleaning and calibration of testing instruments and hardware; and the qualification and training of laboratory personnel performing the test and interpreting the results. The danger of carelessness in test performance and/or inadequately trained personnel may be a particular problem with immunoassays, which are popular for low-cost, large-scale screening of many specimens with readily available equipment and minimum personnel training. The problem nonetheless is also present when GC/MS is utilized.

Affidavit of Dr. Arthur J. McBay, Plaintiffs' Exhibit No. 8 at 3-4.

The Court concludes that the drug testing program is so fraught with dangers of false positive readings as to deny the Customs workers due process of law when they apply for promotion into covered positions. Furthermore, in balancing the legitimate law enforcement, societal and governmental interests of the defendant against the severity of the intrusiveness, the unreliability of the testing further convinces the Court that the drug testing plan is unreasonable and not rationally related to achievement of the governmental interest.

The Defendant Has Failed To Show That A Legitimate Governmental Interest Has Been Threatened

That the drug testing plan is not rationally related to the achievement of a legitimate governmental interest is highlighted by the conspicuous absence of any statistics by the defendant showing any drug problem whatsoever among federal workers. Indeed, in a United States Government Memorandum from the Commissioner of Customs

to all Customs Employees, dated March 13, 1986, the Commissioner stated, "I believe that Customs is largely drug-free. . ." Plaintiffs' Exhibit No. 2 at 1. Since Customs has not demonstrated a drug problem among its work force, the drug testing plan is an overly intrusive scheme that bears no rational relationship to the protection of an endangered governmental interest. The defendant simply has not shown that a legitimate governmental interest has been threatened.

Even if it could show that its interest in a drug-free work force were threatened, the means selected to achieve that end are overly intrusive. After weighing the legitimate governmental interests of the plan against the severity of the intrusiveness, the Court concludes that the drug testing plan is unreasonable.

Receipt Of A Federal Benefit Cannot Be Conditioned Upon Waiver Of Constitutional Rights

The Court holds that it is unconstitutional for the government to condition receipt of a federal benefit, in this case federal employment or promotion, upon the waiver of constitutional rights. If the government were permitted to compel waiver of constitutional rights in order to receive a federal promotion, there would be little stopping the government from extending the principle to require, for instance, that all those who wish to receive welfare benefits must consent to have their urine searched, or that those who wish to ride upon federal highways must consent to have their urine searched. Essentially, the plan requires the federal Customs workers to prove their innocence. Under the United States Constitution, persons are presumed innocent until proven guilty. The Customs Directive would reverse that as to Customs workers.

As Judge Sarokin eloquently noted in *Capua, et al. v. City of Plainfield*, Slip Op. No. 86-2992 (D.N.J. 1986):

> The invidious effect of such mass, round-up urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest. The City of Plainfield essentially presumed the guilt of each person tested. The burden was shifted onto each fire fighter to submit to a highly intrusive urine test in order to vindicate his or her innocence. Such an unfounded presumption of guilt is contrary to the protections against arbitrary and intrusive government interference set forth in the Constitution.

Capua, Slip Op. at 17.

It is up to the government to obtain evidence in a constitutionally permissive manner against those who are suspected of illicit drug usage. If the government has probable cause to suspect a particular Customs worker is using or selling illicit drugs on the job, a warrant should be obtained in a court of law.

The Drug Testing Plan Is Utterly Repugnant To The United States Constitution

The plan put forth in the Customs Directive is so utterly repugnant to the United States Constitution, that this Court has no choice but to permanently enjoin Commissioner William Von Raab from further implementing it.

WHEREFORE, the Petition for Injunctive and Declaratory Relief is GRANTED. The Motion to Dismiss is DENIED. The defendant is ENJOINED from conducting urinalysis drug testing in the absence of probable cause. The Court GRANTS a DECLARATORY JUDGMENT declaring the drug testing program to be unconstitutional.

/s/ Robert F. Collins
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3522

SECTION "C"

NATIONAL TREASURY EMPLOYEES UNION
and ARGENT ACOSTA

versus

WILLIAM VON RAAB, Commissioner,
United States Customs Service

JUDGMENT

This action came on for trial on November 12, 1986 before the Court, Honorable Robert F. Collins, District Judge, presiding, and the issues having been duly tried, and a decision having been duly rendered finding the Customs Directive urinalysis drug testing plan to be utterly repugnant to the United States Constitution,

IT IS ORDERED, ADJUDGED AND DECREED that Commissioner William Von Raab, defendant herein, be PERMANENTLY ENJOINED from conducting urinalysis drug testing in accordance with its published plan.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DECLARATORY JUDGMENT be GRANTED in favor of the National Treasury Employees Union and Argent Acosta, against Commissioner William Von Raab, declaring the Customs urinalysis drug testing plan unconstitutional.

New Orleans, Louisiana, this the 14th day of November, 1986.

/s/ Loretta G. Whyte
LORETTA G. WHYTE
Clerk of Court

Approved as to Form:

/s/ Robert F. Collins
United States District Judge

MINUTE ENTRY
December 3, 1986
COLLINS, J.

Civil Action No. 86-3522

SECTION "C"

NATIONAL TREASURY EMPLOYEES UNION
and ARGENT ACOSTA
versus
WILLIAM VON RAAB, Commissioner,
United States Customs Service

Defendant has moved this Court, pursuant to Federal Rules of Civil Procedure 62(c) and (e), for a stay pending appeal of this Court's final Order dated November 14, 1986.

In considering a Motion for a Stay Pending Appeal, the Fifth Circuit has instructed district courts to carefully weigh four factors:

> (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest.

United States v. Baylor University Medical Center, 711 F.2d 38, 39 (5th Cir. 1983).

Applying this standard to the instant case, the Court concludes that the Motion for a Stay Pending Appeal must be and hereby is DENIED.

The Court sees little or no likelihood of success in Customs' appeal. The Court does not believe that the Fifth Circuit will allow a program so constitutionally deficient to be continued. Indeed, numerous federal dis-

trict courts have recently struck down urinalysis drug testing plans. Judge Vietor, Chief Judge in the Southern District of Iowa, struck down a urinalysis plan covering Iowa Department of Corrections employees on July 9, 1985. *McDonnell v. Hunter*, 612 F. Supp. 1122 (D.C. Iowa 1985). Judge Oberdorfer, in the District of Columbia, ruled on February 25, 1986 that mandatory urine testing of bus attendants in District of Columbia School violated the Fourth Amendment. *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986). Judge Sarokin, in the District of New Jersey, struck down a urinalysis drug testing plan covering City of Plainfield fire fighters on September 18, 1986. *Capua v. City of Plainfield*, No. 86-2992 (D.N.J. September 18, 1986). One day after this Court struck down the Customs urinalysis drug testing plan, Judge Edgar, in the Eastern District of Tennessee, Southern Division, found a department-wide urinalysis drug testing plan covering Chattanooga fire fighters unconstitutional. *Lovvorn, et al. v. City of Chattanooga, Tennessee, et al.*, Slip. Op. No. Civ. 1-86-389 (E.D. Tenn. Nov. 13, 1986). Finally, just last night, Judge Edenfield granted a preliminary injunction blocking urinalysis of civilian police officers on a military base in Savannah, Georgia. *American Federation of Government Employees, AFL-CIO v. Casper Weinberger*, Slip Op. No. CV 486-353 (S.D. Ga. Dec. 2, 1986). The jurisprudence indicates the drug testing plan adopted by Customs is violative of the United States Constitution. The Court concludes that Customs has little likelihood of success on appeal. The Court will not allow constitutional violations to go unchecked pending appeal.

Nor has Customs demonstrated that it will suffer irreparable harm if this Court's injunction remains in effect. The equities are not "heavily tilted" in Customs favor. As this Court has already observed, Customs failed to show that drug testing was initiated in response to a cognizable work force problem, or that drug testing

was necessary to protect any threatened governmental interest.

Customs could not persuade this Court that a legitimate governmental interest would be threatened if its testing program were suspended. Now, in an attempt to persuade this Court nonetheless to stay its decision, Customs has manufactured what it considers to be irreparable harm on its own. The defendant contends that unless this Court's Order is stayed, Customs will be faced either with (a) suspending recruitment and hiring for sensitive law enforcement positions, thereby being unable to implement interdiction efforts mandated by the President and Congress, or (b) continuing recruitment and hiring without drug screening and thereby possibly hiring drug users who are not fit to enforce drug laws. Commissioner Von Raab has determined that unless he can have his way and subject employees to humiliating and unconstitutional urine tests, he will stop filling vacant positions or hiring new employees. The Commissioner has come to this conclusion despite his stated belief that his work force is "largely drug free."

Commissioner Von Raab's ill-advised decision may indeed threaten a legitimate governmental interest, for by diminishing the Customs work force, Von Raab may well jeopardize law enforcement, and even the safety of current employees. However, this danger and harm flow exclusively from Von Raab's attempt to force this Court into allowing him to effectuate his unconstitutional program, and not from this Court's decision to protect employees' constitutional rights. In any event, the harm Customs itself has manufactured cannot be characterized as "irreparable." Von Raab's decision to impose a hiring freeze may be altered at any time, and probably will be. Conspicuously absent from Von Raab's affidavit is a statement that he intends to perpetuate his hiring freeze, even if his stay requests are denied. Indeed, Von Raab's decision to diminish the work force may be di-

rectly contrary to law. This year Congress appropriated additional funds to the Customs Service and specifically mandated that Customs must maintain an average of 14,891 employees throughout the fiscal year. *See* Conference Report to Accompany H.J. Res. 738, Report 99-1005 (October 15, 1986). Accordingly, it may be that Commissioner Von Raab cannot legally continue his "hiring freeze." The Court concludes that the defendant will not suffer irreparable injury if the Motion for a Stay Pending Appeal is denied.

The Court finds that the granting of the stay would substantially harm the other parties to this action. The Court rejects Customs argument that a delay in the filing of this suit by plaintiffs indicates that no harm will be suffered if the urinalysis program is continued. Customs accuses plaintiffs of delay in their pursuit of an injunction, and insinuates that this purported delay shows the testing program does not harm employees. This argument lacks merit. Plaintiffs filed suit within a few days after the drug testing program went into effect as to current employees. They moved for a preliminary injunction just two months later. Customs apparently believes that plaintiffs should be penalized with unconstitutional urine testing as retribution for carefully preparing their case against the Customs program. The accusation of unreasonable delay is puzzling here, moreover, since Customs sought to dismiss the original suit the National Treasury Employees Union filed in the District of Columbia on the grounds that it was not ripe. At that time, Customs contended the suit was unripe because it had not yet begun testing current employees. Apparently, Customs is taking the self-serving view that suits against drug testing programs are not ripe until the first sample is collected, but come too late to justify injunctive relief anytime thereafter. The Court rejects this argument.

Finally, the Court finds that the public interest would not be served by the granting of the stay. This Court has already discussed, in its Opinion of November 14, 1986, the danger that the government may try to extend beyond the federal work place the principle it espoused in this case: that receipt of a federal benefit can be conditioned upon forced waiver of constitutional rights. The Court sees great danger in such a principle. The Court will not allow the defendants to condition receipt of federal employment upon waiver of Fourth Amendment and other constitutional rights. The public interest would be jeopardized, not served, by granting a stay.

The Court concludes: (1) that defendant has not made a showing of likelihood of success on the merits; (2) that the defendant has not made a showing of irreparable injury if the stay is not granted; (3) that the granting of the stay would substantially harm the other parties; and (4) that the granting of the stay would not serve the public interest.

WHEREFORE, the Motion for a Stay Pending Appeal is DENIED.

/s/ Robert F. Collins
United States District Judge

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUL 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1879

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION, ET AL., PETITIONERS

v.

WILLIAM VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Customs Service's drug-testing program, which covers employees who apply for certain jobs in which they would be involved in the interdiction of drug smuggling, is valid under the Fourth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1879

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v.

WILLIAM VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is not yet reported. The opinion of the court of appeals on the government's motion for a stay pending appeal (Pet. App. 29a-39a) is reported at 808 F.2d 1057. The opinion of the district court (Pet. App. 40a-60a) is reported at 649 F. Supp. 380.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1987. The petition for a writ of certi-

orari was filed on May 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, a federal employees' union and a union officer, brought this suit to challenge a program adopted by the United States Customs Service under which persons tentatively selected for certain positions in the Service must be tested for use of illegal drugs before they are hired for the designated jobs. The district court enjoined the program as a violation of the Fourth Amendment, on the ground that it does not require reasonable suspicion of drug use by each person tested. The court of appeals reversed, holding that reasonable suspicion of the person being tested is not an absolute requirement under the Fourth Amendment and that, in the particular circumstances of this case, the Fourth Amendment standard of reasonableness is met.

1. The Customs Service's drug-testing program requires testing of any individual tentatively selected for a job that (1) directly involves drug interdiction, (2) requires the carrying of firearms, or (3) involves access to classified information (which, in the case of the Customs Service, typically means information on drug interdiction tactics and plans).[1] In

[1] Petitioners point out (Pet. 2-3 n.1) that the program covers a number of administrative jobs. In most such cases, the administrative job is covered by the drug-testing program because the job entails access to classified information that reveals drug interdiction plans and tactics, information that might be valuable to drug smuggling organizations. Petitioners made no contention in the courts below that any of the jobs covered by the program failed to meet at least one of the three criteria for testing.

announcing the program, the Commissioner of Customs stated his belief that Customs is " 'largely drug-free' " (Pet. App. 4a). He also stated, however, that Customs employees, by the nature of their jobs, are " 'routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use' " (*id.* at 3a). In the past, Customs agents have been fired for taking bribes, and an employee's use of illegal drugs would increase the danger of his being susceptible to bribery or blackmail (*id.* at 13a). Moreover, as Congress and the Customs Service have recognized, drug use and drug smuggling are serious national problems.[2]

Under the Customs program, an individual who applies for one of the covered positions receives advance notice of the test. The individual provides a urine sample behind the closed door of a stall, with

[2] Because of a surge in drug smuggling in the past several years, Congress recently increased the funding of the Customs Service and directed it to expand its workforce by over 20%, or roughly 3,000 new employees (Pet. App. 12a). Studies relied on by Customs show that, among persons 18-25 years old (which is typically the age of those entering the workforce), 65% have used illegal drugs, and more than 40% of those individuals reported using illegal drugs within the past year. See Declaration of William von Raab, para. 5, Attachment to Defendants' Motion for Stay (to the district court). Even the more recent survey cited by petitioners to show a "general decline" in drug use (Pet. 13) shows a decrease of less than 10% in the use of marijuana and a 38% *increase* in the use of cocaine from 1982 to 1985. National Institute on Drug Abuse, *Highlights of the 1985 National Household Survey on Drug Abuse* (Nov. 1986). Drug use remains a pervasive national problem that affects all segments of society. See *United States* v. *Alvarez*, 810 F.2d 879, 891-892 (9th Cir. 1987) (Noonan, J., dissenting) (statistics on cocaine use).

the person administering the test[3] taking precautions to prevent adulteration or substitution of the sample (see Pet. App. 4a). Thereafter, strict chain-of-custody procedures are followed. Tamper-proof seals are applied; the applicant initials the bottle; and the sample is sealed in a bag and mailed to a laboratory, where a tracking system is maintained for each sample (*id.* at 4a-5a). A quality assurance program intermingles blind samples with specimen samples (*id.* at 21a). Quality assurance reports must be made available to the union. If the laboratory has been making mistakes on the blind samples, the union (and presumably therefore affected employees) can learn of the errors.[4]

Each sample is initially tested by the enzyme-multiplied-immunoassay (EMIT) technique. Any sample that tests positive is then tested by gas chromatography/mass spectrometry (GC/MS). This technique is conceded to be essentially error-free, assuming that the right sample is tested and the proper testing techniques followed (Pet. App. 5a). No sample is considered to be positive unless it is positive on the GC/MS test.

Because some lawful medications produce a positive result on the tests, the applicant is asked (but not required) to fill out a form listing medications.

[3] The test is administered by an employee of an independent contractor.

[4] Weekly testing of blind samples has been employed in the military to maintain reliability in its drug testing of uniformed personnel. As a result, despite the large number of samples tested, the military has not had a single false positive result on its blind samples since the quality assurance program was instituted in November 1983. R. Doc. 15, Attach. 3 (Vogl Affidavit para. 5).

The form is placed in a sealed envelope and is not opened unless the urine test is positive (Pet. App. 4a). In that event, the information on the form is used to help determine whether the positive result may have a legitimate explanation.

2. The district court held the Customs Service's program unconstitutional on numerous grounds (Pet. App. 40a-60a). The court first concluded that the plaintiff union had standing, that venue was proper, and that it had jurisdiction notwithstanding the remedial procedures provided by the Civil Service Reform Act. *Id.* at 42a-50a (citing 5 U.S.C. 1101 *et seq.*). The court then concluded that the drug-testing program deprived job applicants of their Fourth Amendment right to be free from unreasonable searches and seizures, their Fifth Amendment privilege against self-incrimination, their due process rights, and their "penumbral" constitutional privacy rights (*id.* at 50a-60a). The court enjoined the drug-testing program, forbidding the Customs Service to require drug tests of any applicants for the covered positions (*id.* at 61a-62a).

The court of appeals reversed (Pet. App. 1a-27a). The court addressed the constitutional challenges only insofar as the drug-testing program applied to current Customs Service employees who apply for the covered positions; it reversed the district court judgment as applied to outside job applicants for the separate reason that they were not parties to the case (*id.* at 3a, 21a; Pet. 6 n.9). On the merits, the court noted that petitioners did not seek to defend the district court's judgment on privacy-rights grounds (Pet. App. 20a), and the court had no difficulty holding that the drug-testing program did not involve compelled self-incrimination (*id.* at 19a-20a)

and was not so unreliable as to violate job applicants' due process rights (*id.* at 21a). The court also ruled, in the only holding that petitioners challenge here, that the Customs Service's drug-testing program is valid under the Fourth Amendment.

The court of appeals agreed with petitioners that the drug-testing program, by requiring an employee to submit a urine sample and testing the sample for evidence of drug use, effects a search within the meaning of the Fourth Amendment (Pet. App. 6a-9a). The court held, however, that the program is reasonable and therefore constitutional. The court noted that the intrusiveness of the search is limited; official discretion plays no role in determining who takes the test; detecting and preventing drug use by Customs employees serve the strong public interests in promoting integrity, effectiveness, and safety in the Customs workforce, which is involved in the interdiction of drug smuggling; urine samples are taken in as private a place as possible (a restroom); only persons who voluntarily apply for covered positions must take the test; the government requires the test in its role as an employer, and the test is a reasonable condition of employment in the particular positions covered by the program; the program was adopted solely for administrative, not law-enforcement, purposes; as with a heavily regulated industry, the job-relatedness of the testing program diminishes employees' reasonable expectations of privacy; there is no fully adequate alternative to drug testing for employees who are placed in sensitive positions for the first time; and there is no good reason to think the drug-testing program will be ineffective in detecting drug users or deterring their application for sensitive jobs (*id.* at 11a-19a). Considering "the totality of circumstances" and "weighing all of the factors" (*id.* at 11a), the court of appeals held that individualized suspicion is not required in this setting and that "the Customs Service program for testing employees who seek a transfer to sensitive positions is not unreasonable" (*id.* at 19a).

On May 12, 1987, the court of appeals denied petitioners' request for a stay and ordered immediate issuance of the mandate (Pet. App. 28a). On June 1, 1987, this Court denied petitioners' application for a stay, Justice Brennan dissenting (No. A-847).

ARGUMENT

Petitioners challenge the court of appeals' holding that the Customs Service's drug-testing program, as applied to current employees who apply for covered positions, is reasonable and hence valid under the Fourth Amendment.[5] That holding is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court is unwarranted.[6]

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[5] Petitioners do not challenge either the court's refusal to strike down the program on other constitutional grounds or its refusal to reach the merits with respect to individuals who are not current employees (see Pet. i, 6 n.8).

[6] We argued unsuccessfully in the court of appeals that the drug testing here does not constitute a "search" within the meaning of the Fourth Amendment because, like background checks or medical examinations that are legitimate conditions of employment, it does not violate employees' reasonable expectations of privacy (see Pet. App. 6a-9a). Without abandoning that contention, we assume arguendo, for purposes of this response, that the court of appeals correctly viewed the drug-testing program as a search and hence properly engaged in a Fourth Amendment reasonableness inquiry.

1. Petitioners apparently concede (Pet. i, 18-27) that the Fourth Amendment does not always bar drug testing of government employees and job applicants without individualized suspicion, regardless of the circumstances. That concession is demanded by this Court's decisions.

The Court has often stated that what is reasonable under the Fourth Amendment varies with the context of the search and that the probable cause and warrant requirements that generally apply in the law-enforcement setting are not to be mechanically transposed into other settings. See, *e.g.*, *Griffin* v. *Wisconsin*, No. 86-5324 (June 26, 1987), slip op. 4; *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979). Rather, determining the appropriate standard in a particular context requires assessing all the relevant circumstances and "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Place*, 462 U.S. 696, 703 (1983). See also *O'Connor* v. *Ortega*, No. 85-530 (Mar. 31, 1987), slip op. 9 (plurality opinion); *United States* v. *Montoya de Hernandez*, 473 U.S. at 537; *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337-342 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). Moreover, at least where the search is conducted for administrative or regulatory as opposed to law-enforcement purposes, and there are reasonable constraints on official discretion to determine who is subject to the search, there is "no irreducible requirement" of individualized suspicion. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976). See *New Jersey* v. *T.L.O.*, 469 U.S. at

342 n.8; *Delaware* v. *Prouse*, 440 U.S. 648, 654-655 (1979). See also *New York* v. *Burger*, No. 86-80 (June 19, 1987), slip op. 7-11; *Donovan* v. *Dewey*, 452 U.S. 594, 599 (1981); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972); *Camara* v. *Municipal Court*, 387 U.S. 523, 534-539 (1967).

The question presented in this case, therefore, is whether the Customs Service's program is reasonable in the particular circumstances. The court of appeals correctly held that it is.[7]

From the perspective of an employee applying for a sensitive position, it is noteworthy, first, that advance notice of the drug test is given. More important, the testing of bodily fluids required by the Customs Service's program involves procedures that are not significantly different from those performed at many pre-employment physical examinations. Such medical examinations are, of course, quite common. We have yet to encounter the suggestion that the various tests included in such examinations must all be based on reasonable suspicion that the employee has the condition that is the subject of the test.

As the court of appeals recognized (Pet. App. 14a-15a), the employment context is critically important in assessing the propriety of the program. Although government employees do not give up their constitutional rights as a condition of government employment, it is also true, as the Court has recognized in various settings, that the employment context affects the content of a constitutional right. For example, a governmental employer may place restrictions on the

[7] We do not suggest that all of the factors we discuss herein are necessary to justify a drug-testing program under the Fourth Amendment. We contend only that these factors are sufficient to sustain the program involved here.

speech of its employees that would violate the First Amendment if placed on members of the general public. See *Rankin* v. *McPherson*, No. 85-2068 (June 24, 1987), slip op. 5 ("[B]alancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity * * *. [P]ublic employers are *employers*, concerned with the efficient function of their operations."); *Connick* v. *Myers*, 461 U.S. 138, 147 (1983); *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (CIA prior review of ex-employee's memoirs); *CSC* v. *Letter Carriers*, 413 U.S. 548 (1973) (Hatch Act restrictions on political activities of federal employees). Most pertinent to this case, the Court has recently recognized that the "operational realities of the workplace" are important in determining how the Fourth Amendment applies to a public employer acting as such: public employees' legitimate expectations of privacy in that setting are diminished, and the government as an employer has important interests beyond ordinary law enforcement interests. *O'Connor* v. *Ortega*, No. 85-530 (Mar. 31, 1987), slip op. 6 (plurality opinion); slip op. 6 (dissenting opinion); see *Griffin* v. *Wisconsin*, slip op. 4.[8] One

[8] In addition to the employment context, there are other settings in which persons dealing with government may be required to submit to searches without a warrant or probable cause or even individualized suspicion. See, *e.g.*, *Griffin* v. *Wisconsin*, No. 86-5324 (June 26, 1987) (searches of homes of probationers); *New York* v. *Burger*, No. 86-80 (June 19, 1987) (searches of closely regulated businesses); *Wyman* v. *James*, 400 U.S. 309 (1971) (social worker visits to homes of welfare recipients); *McMorris* v. *Alioto*, 567 F.2d 897 (9th Cir. 1978) (search of persons entering courthouse); *United States* v. *Ellis*, 547 F.2d 863 (5th Cir. 1977) (search of automobile of visitor to Naval station). Cf. *United States* v. *Davis*, 482 F.2d 893 (9th Cir. 1973) (federally required search of airline passengers).

such "operational reality" is that employers are expected to investigate the fitness for employment of persons applying for a job, even though the investigation may frequently entail an intrusion that would not be tolerated if a member of the public rather than a job applicant were involved.[9]

The Customs Service, which is charged with the mission of interdicting the smuggling of drugs into the United States, has vitally important interests in its program. Drug use by officials involved in enforcing drug smuggling laws is simply intolerable, not only for "symbolic" reasons, but for the practical reason that the potential for abuse of office is substantial. A supervisor's evaluation of an employee's day-to-day performance, moreover, cannot be relied on as a means of detecting drug use; a drug user whose on-the-job performance is outwardly impeccable may nevertheless be susceptible to bribery or blackmail. The Service cannot assume that alternative means of detecting drug use are as reliable as testing. That the Commissioner believes his present work force is "largely" drug-free does not undermine the need for screening: the fact is that problems have occurred in the past and that problems may arise in the future, particularly since a large amount of hiring for new positions is under way. Indeed, it would

[9] A pre-employment background investigation, which the union urges as an alternative to drug testing (Pet. 27), may be regarded by many as a greater intrusion on personal privacy than drug testing. See *Fraternal Order of Police* v. *City of Philadelphia*, 812 F.2d 105 (3d Cir. 1987) (constitutional challenge to questionnaire given to police officers volunteering for special investigations unit).

be irresponsible for the Customs Service to assume that its current employees or the applicant pool from which it is drawing to meet the congressional mandate for expanded enforcement is now, or will be in the future, somehow immune from a problem that is ravaging the society at large.

In short, there is an important interest—shared by the Customs Service and the public generally—in screening for drug use individuals who will be entrusted with the responsibility for interdicting drug smuggling. Moreover, as the court of appeals noted (Pet. App. 11a-12a), there is no danger in this case that government officials will exercise unbridled discretion in determining who must take the drug test. See *Colorado* v. *Bertine*, No. 85-889 (Jan. 14, 1987), slip op. 1 (Blackmun, J., concurring) (noting Fourth Amendment concern with abuse of official discretion); *Donovan* v. *Dewey*, 452 U.S. at 599 (same); *Delaware* v. *Prouse*, 440 U.S. at 654 (same). The drug-testing program adopted by the Customs Service applies to all individuals who are to be hired for the designated positions, and tests must be taken only by individuals who voluntarily apply for those jobs. In these circumstances, the court of appeals correctly held that the public interest in the drug-testing program outweighs the concerns of those job-seeking individuals who might feel a personal affront when asked to submit to this pre-employment physical examination.

Contrary to the suggestion made in the dissent below (Pet. App. 25a-27a) and repeated by petitioners (Pet. 25-27), this conclusion is in no way undermined by the fact that the Customs program, before it was enjoined, had detected only one drug user. The program was in effect for only several months.

Moreover, the low rate of detection may well be due to drug users' refraining from applying for the covered jobs. If so, the program is helping to achieve its goal, which is not to catch drug users, but to enable the Customs Service to avoid employing them in designated positions. See *United States* v. *Biswell*, 406 U.S. at 316 (deterrence is valid goal of program of inspections without individualized suspicion). In any event, if some current or potential drug users are somehow evading detection by the test (*e.g.*, by suspending their drug use or delaying their job applications), modifications in the program may be needed as the Customs Service gains experience with it. There is obviously no basis, however, for holding the current and otherwise valid drug-testing program unconstitutional because a more onerous program might be more effective.

2. As petitioners seem to concede, there is no conflict among the courts of appeals on the issue they raise. The cases are relatively few in number and have produced judgments keyed to the specific factual and regulatory settings. In no case, however, has a court of appeals accepted the argument, embraced by the district court (Pet. App. 50a-53a) and reiterated by petitioners (Pet. 16-17), that a drug testing program must be struck down because it was conducted without reasonable suspicion or probable cause. There is, accordingly, no conflict calling for this Court's resolution.[10]

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[10] Some of the decisions are collected in the opinion of the court of appeals on the government's motion for a stay pending appeal (Pet. App. 32a n.5; see also *id.* at 21a-22a). The three most recent district court decisions have sustained drug testing. *Rushton* v. *Nebraska Public Power Dist.*, 653 F.Supp. 1510 (D. Neb. 1987) (nuclear plant employees); *National*

Thus, the Eighth Circuit upheld random drug testing of prison guards in *McDonell* v. *Hunter*, 809 F. 2d 1302 (1987). See also *Spence* v. *Farrier*, 807 F.2d 753 (8th Cir. 1986) (prisoners). The Third Circuit upheld random drug testing of jockeys, who are not even public employees, in *Shoemaker* v. *Handel*, 795 F.2d 1136 (1986), cert. denied, No. 86-576 (Dec. 1, 1986).[11] The Seventh Circuit sustained post-accident testing of public transit employees, even in situations where, aside from the fact that an accident occurred, there is no special reason to think the accident was caused by the employee's drug use. *Div. 241, Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264, cert. denied, 429 U.S. 1029 (1976).

Contrary to petitioners' suggestion (Pet. 16-17), the District of Columbia Circuit's decision in *National Federation of Federal Employees* v. *Weinberger*, 818 F.2d 935 (1987), does not create a conflict among the circuits. The court's holding there was limited to a jurisdictional question, and it simply remanded the case for consideration of the constitutionality of an Army drug testing program. The "guidance" it offered to the district court, which is dictum in any event (*id.* at 942-943), does not resolve the question whether individualized suspicion (or reasonable suspicion) is required.

The recent decision of the New York Court of Appeals in *Patchogue-Medford Congress of Teachers* v. *Bd. of Educ.*, No. 156 (June 9, 1987), likewise does not create a conflict calling for this Court's review. The New York court there struck down a drug-testing program applicable to probationary public school teachers when they become eligible for tenure. The court, however, apparently rested its decision independently on the state constitution. See slip. op. 5-7 (majority opinion); slip op. 1-7 (Simons, J., concurring). Moreover, although the court ruled that employee drug testing requires reasonable suspicion (but neither probable cause nor a warrant), it pointedly left open whether that requirement could be met by evidence of a drug problem among the class of probationary teachers as a whole rather than by individualized suspicion (slip op. 10-12). The court struck down the program at issue only after noting that testing took place without individualized suspicion and that it found no evidence of class-wide drug use to support the required testing (*id.* at 11-12).[12]

3. Two related developments also counsel against granting the petition in this case. First, shortly after this lawsuit was filed, the President issued Exec. Order No. 12564, 3 C.F.R. 224 (Sept. 15, 1986), which requires federal agencies to establish drug-testing programs for current employees in sensitive positions. Pursuant to that Order, the Secretary of

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Ass'n of Air Traffic Specialists v. *Dole*, Civ. No. A87-073 (D. Alaska, Mar. 27 1987) (air traffic specialists); *Mullholland* v. *Department of the Army*, Civ. No. 87-0317-A (E.D. Va. May 28, 1987) (helicopter mechanics).

[11] The testing of jockeys in *Shoemaker* was required by the New Jersey Racing Commission.

[12] The court noted that "there is nothing in the record to indicate that [drug use] is * * * a problem among teachers generally or in this particular school district. If it is a problem, it has not been addressed by the legislature, the Regents, the Commissioner of Education or, apparently, this School Board itself, which, as noted, issued no policy statement or regulation relating to the tests. It appears that the Superintendent alone identified the problem and chose a controversial solution." Slip op. 11-12.

Health and Human Services issued draft testing guidelines on February 13, 1987. Second, recently enacted legislation will affect implementation of the Executive Order and the HHS guidelines. Section 503 of the Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 468 (July 11, 1987) (H.R. 1827, 100th Cong., 1st Sess. (1987)), establishes certain new constraints on government drug-testing, including new conditions for implementation of the Executive Order in most parts of the federal government, conditions that are likely to delay implementation of the Executive Order.

Although the Customs Service's program at issue here will remain in place (§ 503(b)(1)(D), 101 Stat. 468; see 133 Cong. Rec. H5680 (daily ed. June 27, 1987)), it must be brought into compliance with the Executive Order within six months (§ 503(b)(2)(A)) and may have to be modified in the future to comply with new scientific guidelines that HHS is required to publish (§ 503(b)(2)(B)). Based on the draft February HHS guidelines, the anticipated changes include an expansion of the testing program to all current employees in sensitive positions as well as provision for review of all positive test results by a medical officer familiar with drug-abuse problems. The likely future changes in the program at issue here and the delay in implementation of drug-testing programs elsewhere in the federal government both weigh against review of this case at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE

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WILLIAM VON RAAB, COMMISSIONER,
UNITED STATES CUSTOMS SERVICE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY MEMORANDUM

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REPLY MEMORANDUM

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1. The government urges that the court of appeals' analysis here was proper because, upon balancing a number of factors, it concluded that the Customs Service's urine testing program is "reasonable," given Customs' strong interest in employing individuals who do not use illegal drugs. Opp. Br. 8-13. However, like the court of appeals below, the government's analytical starting point is incorrect. *See*, Pet. App. at 23a-24a, n.1 (Hill, J., dissenting). The government's brief fails entirely to outline the special needs or circumstances that make it impracticable for the Customs Service to conform to the warrant and probable cause requirements, or include an element of individualized suspicion in the conduct of its urine collection and analysis program. As we have ex-

plained, without contradiction by the government, this Court's decisions require that such special needs exist before a search may be conducted in the absence of any one of these protections against arbitrary governmental invasion of privacy. *See*, Pet. at 18-19; *Griffin* v. *Wisconsin*, No. 86-5324 (June 26, 1987); *New York v. Burger*, No. 86-80 (June 19, 1987).

Under this Court's decisions, it is improper to immediately resort to an *ad hoc* balancing test when determining the lawfulness of a search under the Fourth Amendment. The government must do more than allege that Customs has an important interest in employing individuals who do not use illegal drugs—whether for "symbolic reasons" or otherwise. *See*, Opp. Br. 11-12. Even assuming the importance of that goal, when Customs seeks to conduct an intrusive search to accomplish it, Customs must first establish that the warrant, probable cause, and individualized suspicion requirements would unjustifiably frustrate its accomplishment. *See*, Pet. 18-20. In this case, the government has not demonstrated the need for *any* drug-testing program, and it certainly has not demonstrated that if further drug detection or deterrence programs were required, they could not be structured so as to comport with the Fourth Amendment's presumptive requirements.

Thus, while the government states that other long-standing and lawful employment devices cannot screen out drug users as "reliably" as urine testing (Opp. Br. 11-12), in fact, the undisputed evidence here is to the contrary. As Customs has virtually admitted all along, although it has never used urine tests to screen employees, it has heretofore not experienced any drug problems at all in its workforce.[1]

[1] Customs' glib assertion in its brief (at p. 11) that "problems have occurred in the past" is, at best, misleading. Customs did not introduce *any* evidence in this case that any *drug-related* problem had ever occurred at the agency. In an affidavit submitted in support of a post-decisional motion for a stay in the district court, Commissioner Von Raab stated for the first time in this litigation that a "few" Customs employees have been fired for "integrity violations" in the past few years. Apparently these violations were unrelated to drug use, since the Commissioner did not allege that there was a connection in his affidavit.

Moreover, even if additional deterrence or detection measures were needed, the Customs program at issue here is ineffective, and, not as the government states, (Opp. Br. 11-12), a "reliable" tool. *See*, Pet. 25-27. As a result, countless employees will be subjected to the indignity of urine testing and, equally important, the concomitant revelation of personal medical information, to no good end. Contrary to the government's assertions (Opp. Br. 13) this Court's cases recognize that the ineffectiveness of Customs' current program is a basis for holding it unconstitutional, regardless of whether Customs might later attempt to impose an even more extreme program (involving unannounced and observed urine collection) that, unlike its present program, might actually detect or deter drug use. *See*, Pet. at 25-27.

2. The government suggests that under *O'Connor* v. *Ortega*, No. 85-530 (Mar. 31, 1987), its general interest in investigating employees' "fitness for duty" is, in and of itself, a special circumstance or "operational reality" that justifies any searches undertaken to that end, even without individualized suspicion, and even if they are ineffective. Opp. Mem. at 10-11, citing *O'Connor*, slip op. 6 (plurality opinion), slip op. 6 (dissenting opinion). *O'Connor*, however, clearly suggests the opposite—that the fact that a search is "work-related" does not neutralize the Fourth Amendment, and that "[i]ndividuals do not lose their Fourth Amendment rights merely because they work for the government instead of a private employer." Plurality op. at 6.

First, the office search upheld in *O'Connor*, unlike the urine search at issue here, was in fact based on reasonable suspicion. The Court's decision, accordingly, cannot

be read as sanctioning even an office search—which is necessarily less intrusive than the search of body fluids and concomitant disclosure of personal medical information—without such suspicion. Second, the *O'Connor* plurality was careful to both analyze the practicality of requiring a warrant and probable cause for an office search and to limit its ruling that a warrant and probable cause were not required to searches conducted in the work*place* context—"areas and items that are related to work and are generally within the employer's control." Plurality Op. at 5. The plurality explicitly confirmed that more personal searches in the worksite would be governed by a different standard, and noted that its decision to dispense with the probable cause standard was based, in part, on the "'relatively limited invasion' of employee privacy" involved in an office search. *Id.* at 5, 14, quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967).[2]

Permitting searches as personal and intrusive as urine tests without any level of suspicion at all is not, as the government contends, a logical outgrowth of this Court's Fourth Amendment jurisprudence; it is instead a radical step that warrants this Court's review and reversal.[3] In the past, when this Court has permitted departure from the warrant and probable cause requirements for similarly intrusive and personal searches, reasonable suspicion has been present. *E.g. Griffin* v. *Wisconsin*, *supra* (search of probationer's home); *New Jersey* v. *TLO*, 469 U.S. 325 (1985) (search of student's purse). While this Court has acknowledged that individualized suspicion is not an "irreducible requirement" of a valid search generally, it has never sanctioned a program of intrusive body or other personal searches conducted on employees or any other member of the general population, absent such suspicion. Review of the lower court's decision is necessary to confirm that, at least absent demonstration of an existing and otherwise unremediable drug-related problem in a particular workforce, individualized suspicion *is* an irreducible element of a public employee drug testing program.

[2] Indeed, it explicitly stated that the proper analysis for drug and alcohol testing of employees was not addressed in its opinion. *Id.* at 18, note.

[3] In its brief, the government attempts to minimize the intrusiveness of urine testing by comparing it to a "pre-employment physical examination." Opp. Br. 9. Drug tests, however, are not medical tests; they are body searches. Drug tests are conducted by non-medical personnel in an attempt to secure physical evidence of illegal behavior, not health impairment. *See*, Pet. at 3-4. Moreover, the process for securing urine samples is significantly more intrusive when the sample is to be analyzed for drugs, than when it is taken at a physician's office. *See*, Pet. at 3 & n.2. The drug tests at issue here are no more like medical examinations than the blood test at issue in *Schmerber* v. *California*, 384 U.S. 757 (1966).

3. The government does not take issue with our contention that the legal questions presented by this case are of great national importance, that the law concerning drug testing is unsettled and that the number of cases in which drug testing issues are present is proliferating. Indeed, since our petition was filed, several new suits have been brought to obtain relief from drug testing programs implemented by other federal agencies.[4] Moreover, at least three courts have concluded, in conflict with the lower court's ruling here, that requiring public employees to submit to urine tests in the absence of individualized suspicion violates the Fourth Amendment. *Amalgamated Transit Union, Local 1277* v. *Sun Line Transit Agency*, No. 86-8270 (C.D. Cal., July 7, 1987) (random testing of transit employees unconstitutional); *Feliciano* v. *City of Cleveland*, 661 F.Supp. 578 (N.D. Ohio 1987) (urine testing of police cadets absent reasonable suspicion unconstitutional); *Patchogue-Medford Congress of Teachers* v. *Board of Education*, 517 N.Y.S. 2d 456 (1987) (test-

[4] *American Federation of Government Employees, AFL-CIO* v. *Weinberger*, No. 87-790 EJGEM (E.D.Cal., filed June 18, 1987), transferred to D.D.C., No. 87-1797 (suit against drug testing of civilian employees of the Army); *American Federation of Government Employees, AFL-CIO* v. *Dole*, No. 87-1815 (D.D.C., filed July 7, 1987) (drug testing of transportation workers).

ing probationary school teachers without individualized suspicion violates the Fourth Amendment); *but see, United States* v. *City of San Francisco*, No. C-84-7089 (N.D. Cal., August 25, 1987) (denying injunction against preemployment testing of firefighter trainees).[5]

The government contends (Opp. 13-14) that review of the Fifth Circuit's decision is nonetheless unwarranted because the federal courts of appeals are not yet in direct conflict on the issue of whether public employees may be required to submit to urine tests absent individualized suspicion. However, the government does not deny that all of the federal courts of appeals and lower courts have employed divergent analyses, and that the court of appeals' decision here sanctions testing without suspicion of a far broader category of employees than any previous court of appeals. *See*, Pet. 14-16 & 17-19, 20. Nor does it deny that, as we have argued, the Customs program could not survive under the analysis set forth by the D.C. Circuit in *National Federation of Federal Employees* v. *Weinberger*, 818 F.2d 935 (1987). As we have argued, this Court should not postpone review until a direct conflict among the courts of appeals arises because the lower court's decision conflicts with this Court's decisions and analyses, and because the legal issues raised here are too immediate and important to the Nation and to millions of public employees to allow them to continue

[5] The government surprisingly asserts (Opp. 14-15 & n.12) that the lower court's decision is not in conflict with the decision of New York State's highest court in *Patchogue-Medford*, which struck down an essentially identical drug-testing program that applied to school teachers seeking tenure. The government observes that "the court struck down the program at issue only after noting that the testing took place without individualized suspicion and that it found no evidence of class-wide drug use to support the required testing." Opp. Br. 15, citing Slip Op. at 11-12. However, precisely the same situation obtains under the Customs program. Here, as in *Patchogue-Medford*, there is no evidence of "class-wide drug use" and urine testing is conducted without individualized suspicion. Accordingly, the decisions of the New York Court of Appeals and the lower court here are in direct conflict.

to ferment in the lower courts without this Court's guidance.[6]

The petition for a writ of certiorari should be granted.

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[6] Recent legislation delaying partially the implementation of Executive Order 12564 does not make this case less worthy of review. *See*, Opp. Br. 15-16, citing Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, 101 Stat. 468 (July 11, 1987). The Government has stated elsewhere that by December it expects to be ready to announce programs at dozens of agencies, including all the cabinet-level departments. Federal Times, July 27, 1987, p. 2, col. 1. Further, many agencies, including the Customs Service, are exempt from the temporary delay created by the legislation. *See*, Section 503(b)(1)(C) (exempting agencies with pre-existing testing program). The programs of two other exempt agencies—the Department of Defense and the Department of Transportation are in litigation now, as is the Executive Order itself. *See, supra*, at 5, n.4; Pet. at 13, n.14.

Moreover, the fact that Customs intends to *expand* its current program to bring it into compliance with the Executive Order (Opp. 16), presents an additional reason to review its current program, and establish the standards that will determine the lawful parameters of this and future urinalysis programs. If, as we contend, the current program is unconstitutional, then future more intrusive programs are also illegal, and should not be permitted to proceed.

SUPPLEMENTAL BRIEF

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

In the past few months, two courts of appeals have issued decisions bearing directly on the issues presented in the petition for a writ of certiorari in the instant case. Each has ruled unconstitutional drug testing programs that required public employees to provide urine samples for chemical analysis. In the most recent decision, *Railway Labor Executives' Association, et al. v. Burnley*, No. 85-2891 (9th Cir., February 11, 1988), the court of appeals ruled, in direct conflict with the ruling of the court below, that individualized suspicion is the constitutional prerequisite for requiring railroad employees to undergo drug tests. In *Jones v. McKenzie*,

833 F.2d 335 (D.C. Cir. 1987), the court of appeals concluded that the District of Columbia could not require a school bus attendant to undergo a urine test as part of her annual physical examination to enforce a rule that she not report to work under the influence of drugs. The latter court did not address the level of suspicion required to conduct individualized testing (*id.* at 339), but held the program unconstitutional because the tests bore no nexus to the government's safety related concern.[1] The development of a direct conflict in the circuits concerning the validity of programs that require employees to surrender urine samples without particularized suspicion, and the continued proliferation of challenges to drug testing programs in the lower courts make it even more imperative now that this Court grant review of the Fifth Circuit's decision below, than it was when this petition was filed last June.

1. In *Railway Labor Executives' Association*, the court of appeals, in a 2-1 decision, ruled that Federal Railroad Administration regulations that mandated and authorized blood and urine testing of all members of a train crew following an accident or fatal incident violate the Fourth Amendment. While the court acknowledged that the regulations were issued in response to a "serious" alcohol and drug abuse problem in the railroad industry, it concluded that individualized suspicion of impairment

[1] In addition to the decisions of the Ninth Circuit in *Railway Labor Executives' Association*, and the D.C. Circuit in *Jones*, since our last submission was filed, the Eleventh Circuit, in *Everett* v. *Napper*, 833 F.2d 1507 (1987), ruled that a firefighter may be subjected to a urine test upon reasonable suspicion of drug use. Two district courts, facing challenges to testing programs similar to the one at issue here, have concluded that the government may not require employees in law enforcement positions to submit to urine tests absent individualized suspicion of drug use. *Policemen's Benevolent Association of New Jersey* v. *Township of Washington*, 672 F. Supp. 779 (D.N.J. 1987); *Taylor* v. *O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987).

is a necessary prerequisite to toxicological testing of railroad employees. Slip op. at 6-7; 26-28. As both the majority and the dissent recognized, the court's reasoning and conclusion are in conflict with the Fifth Circuit's reasoning and conclusion in the instant case, which permit Customs employees to be required, as a condition of employment, to submit to urine tests absent any individualized suspicion of drug use. Majority opinion at 32; Dissenting Opinion at 8-9, 11.[2]

The Ninth Circuit began by agreeing with the court below (and virtually every other court to consider the issue), that urine tests are "searches" within the meaning of the Fourth Amendment. Slip op. at 8-9. Thereafter, however, its mode of analysis differed from that of the Fifth Circuit in every respect.

First, the Ninth Circuit viewed urine testing as considerably more intrusive than did the court below. It rejected the analogy drawn by the government (and the Fifth Circuit below, App. 10a-11a) between urine tests and the other less intrusive personal searches held lawful by this Court even in the absence of individualized suspicion. It concluded that "stops for questioning, patdown searches and magnetometer searches do not approach the degree of intrusiveness involved in toxicological testing of body fluids." Slip op. at 23.

[2] Citing the decision below, the Ninth Circuit noted that "[w]e are mindful that our decision may be seen as conflicting with decisions of other circuits." Slip op. at 32. It justified creating this conflict, however, on the ground that "[w]e do not think the factors the Fifth Circuit considered in analyzing the reasonableness of the testing program, 816 F.2d at 477-82, are precisely the factors we consider relevant, because the court did not consider the crucial question which is the foundation of the reasonableness test, i.e., whether the search is justified at its inception." *Id.*, relying on the decisions of this Court in *O'Connor* v. *Ortega*, 55 U.S.L.W. 4405 (March 31, 1987) and *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985).

The Ninth Circuit concluded that the exigencies of testing for the presence of alcohol or drugs in body fluids precluded obtaining a warrant. Slip op. at 14-16. After stating that adherence to a probable cause standard was not required on balancing the railroad employees' privacy expectations with the "significant safety concerns of the government" (*id.* at 25), the court applied the two-prong test of reasonableness this Court applied in *O'Connor* v. *Ortega*, 55 U.S.L.W. 4405 (March 31, 1987) and *New Jersey* v. *T.L.O.*, 469 U.S 325 (1985). The court determined that the urine searches to be conducted under the regulations were neither "justified at [their] inception" nor "reasonably related in scope to the circumstances which justified the interference in the first place." Slip op. at 25-31.

Addressing the first prong of the test, and in direct conflict with the decision of the Fifth Circuit below, the Ninth Circuit concluded that particularized suspicion is "essential" to finding toxicological testing of employees "justified at its inception." Slip op. at 26. It held that accidents or rule violations, by themselves, "do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew." *Ibid.* Moreover, the court concluded, "it poses no insuperable burden on the government to require individualized suspicion" when testing is done to improve the safe operation of a railroad. Slip op. at 27. On the contrary, to require such individualized suspicion before testing "comports with the great weight of authority holding that a warrantless search of a person is unconstitutional without a degree of specific suspicion." *Id.* at 28.[3]

[3] In ruling the railroad drug testing program unconstitutional, the court of appeals explicitly placed itself among those lower courts that have disapproved "broad based testing without particularized suspicion" and departed from those courts, including the Fifth Circuit, that have approved testing programs conducted without suspicion. Slip op. at 28, citing cases.

The court also ruled that without an individualized suspicion component to the testing program, the program was not "reasonably related in scope to the circumstances which justified the interference in the first place", because it is clear that urine tests cannot measure current drug intoxication or degree of impairment, the object of the government's concern. Slip op. at 29-31. Only in conjunction with observable symptoms of impairment, the court concluded, could a positive test result provide a sound basis for invoking discipline. *Id.* at 30.

Finally, the court of appeals determined, in conflict with the decision below (App. 16a-17a), and in agreement with petitioners' position here (Pet. 23-24, n.26), that this Court's decisions permitting warrantless inspection schemes in highly regulated industries have no application to public employee urine testing programs. "All of the decisions in this line of cases," the court said, "have upheld warrantless searches of property, not of persons, and we decline to make such an extension in this case." Slip op. at 19.

2. The Ninth Circuit's decision in *Railway Labor Executives' Association* carefully applies this Court's decisions in a manner consistent with the arguments made in our opening brief (Pet. 17-22), and lends further support to petitioners' contentions that the instant case was wrongly decided by the court below.[4] Mandatory urine

[4] While we believe the Ninth Circuit's conclusions were generally sound, we note that the court's reasons for departing from the probable cause standard were not clearly articulated. *See* slip op. at 25. It appears that the court believed that the pressing safety related concerns underlying the railroad testing program required departure from the stricter probable cause standard. The same cannot be said of the Customs program, where testing is not triggered by any accident or incident, and where there is no evidence of a drug problem, large or small, in the workforce. But regardless of whether probable cause or reasonable suspicion would be the appropriate standard under the Customs program, in this case the Fifth Circuit ruled urine testing constitutional where no particu-

testing of all employees seeking promotion, without individualized suspicion, is even less justified at its inception than post-accident testing. And its scope, like that of the train crew search, is unrelated to at least some of its stated goals, since the test cannot measure impairment or intoxication on the job. As Judge Alarcon pointed out in dissent in the *Railway Labor Executives* case, "the threat posed by drug or alcohol impaired railroad workers transporting hazardous materials across the nation is *far* graver than the potential danger presented by the customs officers in *Von Raab* . . ." Slip op. at 11 (original emphasis). Judge Alarcon was certainly correct in that regard; as we have described, the Customs program covers many employees who are not in positions affecting the public safety, and the Fifth Circuit did not significantly rely on the need to protect the safety of the employees themselves and their fellow workers in upholding the program. Pet. 15-16.[5]

Moreover, the record in the present case provides even less justification than the railroad case for dispensing with the protection of the probable cause and/or individualized suspicion requirements in order to vindicate the government's interests. In the railroad case, the parties all agreed that alcohol and drug use were serious and documented problems in the railroad industry. Slip op. at 6. By contrast, in the present case, the parties agree

larized suspicion at all is required, and without examining the government's justification for departure from those standards.

[5] Under the Customs program, the "safety" justification is offered for the coverage of employees who carry firearms. Pet. App. 13a. Of course, to the extent that the court below was concerned with safety, its reasoning is subject to the same criticism the Ninth Circuit levelled against the railroad program, and the D.C. Circuit levelled against the school system's program in *Jones*, since the tests bear no relationship to impairment or performance, but only to drug use. *See*, Slip op. at 29-30; *Jones* v. *McKenzie*, 833 F.2d at 340-341 (*see infra* at 8).

that drug use has never been a problem among employees at Customs, an agency that Commissioner Von Raab has declared to be "known throughout the law enforcement community as [one] whose employees demonstrate noteworthy integrity." Plaintiffs' Exhibit 2, p. 2. Indeed, during the first five months of the program not a single employee had produced a positive sample. Thus, there is even less justification in this case for permitting the significant intrusion of body fluid testing without any suspicion at all.[6]

Finally, the Ninth Circuit clearly recognized that the efficacy of the testing program to meet the government's goals is an essential factor in determining its reasonableness. The railroad testing program was flawed because it was overinclusive—that is, there would be no way to determine (absent other indicia of drug or alcohol use) whether an employee was impaired on the job, merely on the basis of a positive urine test. The Customs program suffers the identical flaw, and, because it is a one-time test, given with full notice, cannot even be said to effectively deter or detect drug use, on or off the job. *See* Pet. 25-27. Thus, while the railroad program might arguably serve the purpose of deterring or detecting some violators among those tested, the Customs program will not even

[6] Alluding to the characterization the Fifth Circuit employed, the Ninth Circuit noted that one feature of the Customs program that made it different from the railroad plan was its "voluntary" nature. Slip op. at 32. However, it is clear that, particularly given the breadth of positions covered under the program, the decision to submit to a urine test can in no meaningful sense be considered "voluntary" because refusal to submit means loss of an employment opportunity and career advancement at the Customs Service. There is no constitutionally significant difference between being forced to choose between one's privacy and a current job or one's privacy and a future job. The Ninth Circuit noted that the validity of preemployment drug screening was not before the court. Slip op. at 32. Nonetheless, the court criticized the Fifth Circuit's failure to consider the crucial individualized suspicion requirement in its analysis, even assuming the "voluntariness" of the program. *Ibid.*

have that benefit to show for its violation of the privacy of innocent employees.

3. In addition to the Ninth Circuit's very recent decision, in November of 1987, the D.C. Circuit issued a decision in *Jones* v. *McKenzie*. In that case, the court of appeals ruled that drug testing of school bus attendants as a part of their annual medical examinations violated the Fourth Amendment. The D.C. Circuit also applied the two-pronged test this Court articulated in *O'Connor* and *T.L.O.* Without addressing the need for individualized suspicion outside the context of a medical examination, it concluded that testing of school bus attendants as a part of their annual medical examination was "justified at its inception" given their safety-related responsibilities. 833 F.2d 340. The court nonetheless found the program unconstitutional because, like the Ninth Circuit, it believed the testing program was not reasonably related to the school system's safety related concern, since urine tests do not measure impairment. *Id.* at 340-341. To the extent the Customs program is based upon the government's interest in safety when employees carry firearms, the D.C. Circuit's analysis suggests that it too would fail the second prong of the *O'Connor-T.L.O.* test.[7]

4. Thus, the questions surrounding the chemical analysis of public employees' body fluids continue to percolate in the lower courts. Yet, despite the proliferation of de-

[7] It is noteworthy that in *Jones*, the court observed that the school system had instituted its testing program in response to a perceived "drug culture" among transportation employees: "[t]here were repeated incidents of bizarre or dangerous drug-related behavior by drivers and attendants while on duty; syringes and bloody needles were found in restrooms used by Transportation Branch employees; and the head of the Branch estimated 'that 60% of the employees assigned to the Transportation Branch are using narcotics to some extent'." 833 F.2d at 336. This stands in marked contrast to the facts of the instant case, where the government has conceded that no such problem has ever existed in the Customs Service.

cisions in the courts of appeals and district courts, no consensus has emerged concerning the degree to which urine testing intrudes into personal privacy, under what circumstances it may be conducted without individualized suspicion, and where the law of drug testing fits in relation to the rest of this Court's Fourth Amendment jurisprudence. Nevertheless, many innocent public employees are being subjected to these invasive tests, and will continue to be so subjected, until this Court finally resolves these important issues. Now, in light of the Ninth Circuit's decision, a direct conflict exists among the federal courts of appeals. This case provides the Court with an excellent opportunity to resolve the conflict and to provide the lower courts with the guidance they so clearly need in addressing the complex and highly charged issues presented by urine testing programs. For that reason, and the reasons set forth in our previous submissions, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1988

JOINT

APPENDIX

Supreme Court, U.S.
FILED
MAY 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1879

(4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION, and
ARGENT ACOSTA, President, Chapter 168,
National Treasury Employees Union,
Petitioners,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 27, 1987
CERTIORARI GRANTED, FEBRUARY 29, 1988

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3833

NATIONAL TREASURY EMPLOYEES UNION and
ARGENT ACOSTA, President, Chapter 168,
National Treasury Employees Union,
Plaintiffs-Appellees,

versus

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Defendant-Appellant.

RELEVANT DOCKET ENTRIES

Date	Filings—Proceedings
12/22/86	Flg. amicus certificate of service of motion to file brief, memorandum and brief on Charles C. Garreston.
12/31/86	Flg. Order, mot. to stay is under consideration by the Ct. & will be ruled on in the next few days. Further ordered the mot. expedite is GRANTED. The appeal will be heard the week of Feb. 2, 1987. (ABR, CDR, PEH)
01/14/87	Flg. opinion-order denying stay subject to its full reconsideration by a panel hearing the merits of this cause. (CDR) (PEH concurring) Published, PC
1/26/87	Flg. ltr. dtd. 1/22/87 from Joyce Foreman enclosing 4 copies of proof of service on the interested parties re motion to file amicus brief.
1/28/87	Flg. appellant's renewed motion for a stay pending appeal.

Date	Filings—Proceedings
1/30/87	Flg. appellees' memo in opposition to appellant's renewed motion for stay pending appeal.
2/2/87	Flg. Letter response of appellant dtd 1/30/87 to questions of the Court. (J)
2/3/87	Flg. Response to Court's Questions for oral argument. (J).
4/27/87	Flg. appellees' motion for stay of Judgment pending application for writ of certiorari. —Sub ARB 4-27-87
5/4/87	Flg. ltr. dtd. 5/1/87 from Justice Dept. enclosing memo in opposition to motion for stay of judgment pending application for writ of cert.
5/4/87	Flg. ltr. dtd. 4/29/87 from appellees advising Court that appellees were informed yesterday that absent a stay of judgment the Customs Service plans to reinstitute its enjoined urine testing program on May 12, 1987.
5/6/87	Flg. memo of appellees in reply to appellant's opposition to motion for stay of judgment pending application for a writ of cert.
5/12/87	Flg. order DENYING appellees' motion for a stay of this court's April 22, 1987 judgment, pending application for cert. The Clerk is directed to issue the mandate forthwith. (EDWARDS/ABR/RMH)
6/4/87	Flg. ltrd. dtd. 6/1/87 from S. Ct. advising that "the application for stay presented to Justice White and by him referred to the Court is DENIED. Justice Brennan would grant the application."
8/17/87	Flg. copy ltr. dtd. 8/14/87 from Joyce A. Forman and request for consent to file an amicus brief (brief attached) all captioned for S. Ct.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. ———

NATIONAL TREASURY EMPLOYEES UNION
1730 K Street N.W.
Suite 1100
Washington, D.C. 20006
(202) 785-4411

and

ARGENT ACOSTA
President, Chapter 168, National
Treasury Employees Union
P.O. Box 669
Metaire, Louisiana 70004
(504) 589-6802,

Plaintiffs,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service
1301 Constitution Avenue, N.W.
Washington, D.C. 20229
(202) 566-8195,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

This is an action to enjoin the United States Customs Service from implementing a plan to require its current employees to submit to mandatory collection of their urine to screen for the use of illegal drugs as a condition of obtaining promotions and advancement in their careers. Customs will institute this invasive procedure

despite its admission that its workforce is largely drug-free, without any grounds whatsoever to believe particular employees are impaired by, or users of, illegal drugs, and despite the fact that the plan will not, in fact, succeed in identifying those employees who do use illegal drugs. By making submission to the procedure a condition of obtaining promotions and career advancement, the Customs Service's plan violates the rights of its employees under the Fourth Amendment to be free of unreasonable searches and seizures.

In this action, plaintiffs seek a declaratory judgment that the Customs Service's plan violates the constitutional rights of affected employees. In addition, plaintiffs seek an injunction against implementation of the plan.

JURISDICTION

1. This court has jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 2201, and 5 U.S.C. 701 *et seq.*

VENUE

2. Venue is properly laid in accordance with 28 U.S.C. 1391(e).

PARTIES

3. The National Treasury Employees Union (NTEU) is an unincorporated association that has its principal place of business at 1730 K Street, N.W., Suite 1100, Washington, D.C., 20006. Pursuant to Title VII of the Civil Service Reform Act of 1978, Public Law 95-454, 92 Stat. 1111, NTEU is the exclusive bargaining representative of approximately 120,000 federal employees, including over 9,000 employees of the defendant United States Customs Service. NTEU represents several thousand Customs employees in the South Central region of Customs, which is headquartered in New Orleans. NTEU represents the interests of Customs employees by, *inter alia*, negotiating collective bargaining agreements, arbi-

trating grievances under such agreements, filing unfair labor practice charges, lobbying Congress for favorable working conditions, pay and benefits, and litigating their collective and individual rights in the federal courts. NTEU sues here on behalf of its approximately 5,500 members in the Customs Service, whose constitutional and statutory rights will be violated by the mandatory urine collection and screening program.

4. Argent Acosta is a Customs employee and President of NTEU Chapter 168, whose office is in New Orleans. NTEU Chapter 168 represents the interests of several thousand Customs bargaining unit employees in the South Central Region of the Customs Service, which includes Louisiana, Mississippi, Alabama, Tennessee, and Arkansas. The Regional Headquarters of the South Central Region, as well as a District Office, and Port of Entry (on the Mississippi River), are located in New Orleans.

5. William von Raab is the Commissioner of the United States Customs Service. Von Raab is responsible for the creation and implementation of the mandatory screening program. He is sued in his official capacity.

STATEMENT OF CLAIMS

6. In December, 1985, the Customs Service established a Drug Screening Task Force to determine whether and how to implement a program for the collection of urine samples to screen employees for the use of illegal drugs. Attachment 1, page 1.

7. On March 13, 1986, in a memorandum to all Customs employees, defendant von Raab announced that although he believed Customs employees were "largely drug free," a urinalysis drug screening program would be implemented in the Summer of 1986, in order to "set an important exmaple in our country's struggle with this most serious threat to our national health and security." Attachment 1, page 2. Von Raab confirmed that Customs

intended to go forward with the program in a memorandum to all employees, dated May 8, 1986. Attachment 3. In his May 8, 1986, memorandum, von Raab reconfirmed that "the extent of illegal drug use by Customs employees was not the reason for establishing this program." *Id.* at page 1.

8. On June 16, 1986, the Customs Service issued a Directive, formally establishing the drug screening program. Attachment 4.

9. Thereafter, negotiations were held between the Customs Service and NTEU concerning implementation of the drug screening program, and a new Directive was issued, reflecting changes agreed to by the parties. Attachment 5. During the negotiations NTEU reserved its right to object to implementation of the program on constitutional grounds.

10. In accordance with the Directive as revised, beginning August 11, 1986, current employees who seek career advancement by applying for, and being selected to a broad range of positions in the Customs Service will be required, as a condition of employment, to provide urine samples for drug screening under close observation. Attachment 6, pp. 1,6.

11. Vacancies for many of the covered positions open up on a continuing basis in the South Central Region of the Customs Service and in the New Orleans area in particular. NTEU Chapter 168 members have applied for and been selected for these positions in the past and will continue to do so in the future. In accordance with the Directive, these employees will be required to submit to mandatory collection of their urine, as a condition of placement.

12. Under the Directive, the urine samples collected from employees will be analyzed for the presence of illegal drugs through an initial "immunoassay" screening test and a second test using gas chromatography/mass spectrometry. Attachment 6, p. 8. The tests will screen for the presence of cannaboids (marijuana); amphetamines; cocaine; opiates (including heroin and morphine); and phencyclidine (PCP). *Id.*

13. The tests Customs will utilize do not measure impairment, nor do they differentiate between chronic drug use and infrequent use.

14. At best, the tests can only detect the use of illegal drugs that has occurred within a very short time before the sample is collected. The use of cocaine, PCP, amphetamines, barbituates and heroin can only be detected for up to 2-5 days. The use of marijuana can be detected for a maximum of approximately 30 days. Because employees are usually notified of vacancies over 30 days before a selection is made, a user of illegal drugs can easily thwart the test by refraining from use during the selection period.

15. In addition to failing to detect persons who do use illegal drugs, the tests will also result in false positive readings caused by operator error, by faulty storage and transportation of samples, by legitimate use of over-the-counter and prescripition medication, by diet, and by other factors.

16. Employees who refuse to submit to the screening will be denied the position for which they have been selected, as will employees whose results are positive. Employees whose results are positive will also be subject to removal. Attachment 6, p. 11.

CAUSE OF ACTION

17. The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures conducted by the government.

18. The collection of urine samples is a "search" within the meaning of the Fourth Amendment.

19. The collection of urine samples from current employees is unreasonable because there is no evidence of significant use of illegal drugs amongst Customs employees, because the procedure will not identify those employees who do not use illegal drugs, because the tests will result in false positive readings, and because the tests are invasive and will be administered without any particularized suspicion.

20. By implementing a program that requires employees to undergo warrantless, unnecessary, and unreasonable mandatory urinalyses as a condition of obtaining career advancement within the government service, the Customs Service will violate the Fourth Amendment rights of plaintiffs and the employees they represent.

REQUEST FOR RELIEF

WHEREFORE, based on the foregoing, plaintiff requests judgment against the defendant:

A. Declaring the drug screening program illegal as in violation of the Fourth Amendment of the Constitution;

B. Enjoining the Customs Service from requiring employees to submit to drug screening in the absence of reasonable grounds to believe that they are users of illegal drugs;

C. Ordering defendants to pay a reasonable amount of attorneys fees and costs as determined by the Court;

D. Ordering such other future relief as the Court deems just and proper.

Respectfully submitted,

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ATTACHMENT 1

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

UNITED STATES GOVERNMENT

Memorandum

Date: March 13, 1986

File: PER-1:CM

TO: All Customs Employees

FROM: Commissioner of Customs

SUBJECT: Drug Screening Program

In recent weeks and months, the use of urinalysis to detect the presence of illegal drugs has received a great deal of publicity in the press. There have even been stories about Customs plans in this area. I would like to set the record straight on our plans, and also, I would like to provide you with my own views on the use of drug screening through urinalysis in the workplace.

First, we *are* considering the implementation of a drug screening program this fiscal year within Customs. I believe that Customs is largely drug-free; however, unfortunately no segment of society is immune to the threat of illegal drug use. Since our primary enforcement mission is drug interdiction, we cannot tolerate the illegal use of drugs in the Customs Service. I feel very strongly that there is no room in the Customs Service for those who break the laws prohibiting the possession and use of illegal drugs.

Secondly, urinalysis *has* been found to be a technically valid way to determine whether or not an individual has recently used illegal drugs.

In December 1985, I established a Drug Screening Task Force to research all facets of drug screening to determine its applicable use within Customs. The Task Force includes representatives from the Offices of the Comptroller, Enforcement, Internal Affairs, Commercial Operations (Technical Services Division) and Chief Counsel. The Task Force has done extensive research on drug screening; they have consulted with doctors and scientists who are experts in the field. They have found that drug screening through urinalysis is technologically reliable, valid and accurate.

I would like to implement the program this summer, in two phases. Under Phase I, applicants (including employee applicants) for positions covered by the program would be required to undergo urinalysis prior to placement in the position. After implementation of Phase I, the program would be expanded to include selected testing of current employees in positions covered by the program. Employees at all levels who occupy covered positions would be tested, regardless of grade or title.

The Customs drug screening program would cover the range of drugs which are most widely subject to abuse in our society. Although this range may change, just as drug abuse patterns change, at the current time, the drug classes under consideration for testing are: cannabinoids (marijuana); amphetamines; cocaine; opiates (includes heroin and morphine); and, phencyclidine (PCP).

Urine samples would be tested for these drugs, within strict technical and administrative parameters. No positive findings would be based on one test. Instead, the samples would first be subject to analysis through a precise screening method test (immunoassay); a confirmation test using gas chromatography/mass spectrometry would then be run for any positive findings resulting from the initial screening. Both of these tests would be run in a strictly controlled laboratory environment.

The Customs Service has been known throughout the law enforcement community as an agency whose employees demonstrate noteworthy integrity. Implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security.

ATTACHMENT 2

NATIONAL LABOR RELATIONS PROGRAM OFFICER
UNITED STATES CUSTOMS SERVICE
WASHINGTON

PER-1-CM:HR

Mar. 14, 1986

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1730 K St. N.W.—Suite 1101
Washington, D.C. 20006

Dear Mr. McEleney:

This is to inform you that the U.S. Customs Service is considering the implementation of a drug screening program through the use of urinalysis. We are considering a phased-in approach to the program with implementation of Phase I to begin in June 1986.

Under Phase I, applicants (including employee applicants) for categories of positions covered by the program would be required to undergo urinalysis prior to placement in the position. After implementation of Phase I, the program would be expanded to include the random and unscheduled testing of current employees in positions covered by the program.

Although specific position coverage is still being assessed, we anticipate that the following general categories of positions would be included under Phase I: positions involved in drug interdiction and enforcement of related laws; positions with duties related to national security; positions with duties related to intelligence; and, positions involving the use of equipment (including firearms) and/or the protection of property and persons.

Applicants for all levels of positions covered by the program would be tested regardless of grade, rank or

title, Drug screening will be considered a condition of employment/placement in the position. In addition, employees who are found to have used drugs would, of course, be subject to disciplinary/adverse action.

Employees would be tested for a range of illegal drugs which are most widely subject to illegal use in our society. Presently, we plan to test for the following drugs: cannabanoids (marijuana); amphetamines; cocaine; opiates (including heroin); and phencyclidine (PCP).

Urine samples would be tested for these drugs within strict technical and administrative parameters. The samples would be subject to an initial screening test called immunoassay. A confirmation test using gas chromatography/mass spectrometry would be run for any positive findings resulting from the initial screening. We are considering contracting for the collection of urine samples as well as for laboratory analyses.

We will be providing you with additional information on this important program at a later date.

Sincerely,

/s/ Robert L. Lewis
ROBERT LEWIS
National Labor Relations
Program Officer

ATTACHMENT 3

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

UNITED STATES GOVERNMENT

Memorandum

Date: May 8, 1986
File: PER-1:CM

TO: All Customs Employees
FROM: Commissioner of Customs
SUBJECT: Drug Screening Program

In my March 13, 1986 memorandum, I advised that we were considering the implementation of a drug screening program through urinalysis. Since that time, I have made the decision to go forward with the program. This decision was not made lightly; only after careful research into the technical merits of the process were we able to reach the conclusion that drug screening technology is accurate and reliable.

The extent of illegal drug use by Customs employees was not the reason for establishing this program. In fact, I hope and expect to receive reports of very few positive findings through drug screening. However, because our enforcement mission is drug interdiction, I feel it is absolutely essential to take protective measures against the threat of illegal drug use. The very nature of our mission mandates that we ensure that our employees are not illegal drug users.

Customs employees, more than many other Federal employees, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use. Many of our jobs put us in contact with this

criminal element, as well as with illegal substances themselves. In fact, many of you are constantly faced with challenges to your integrity. Some of you have told me that you would appreciate assurances that your coworkers are not illegal drug users, since your personal safety can depend on the performance of a partner.

In addition, every workplace, large or small, is affected by the problems of substance abuse. Primary indicators are lowered productivity, absenteeism and tardiness, morale problems, higher employee turnover, increased health insurance costs, accidents, theft of company/personal property, and poor decision-making.

The use of urinalysis to test for drugs is actually not a new practice. The military has been administering drug tests for a number of years. Further, almost 25 percent of FORTUNE 500 companies now have drug-testing programs. Since drug screening is a new initiative for Customs, I would like to take this opportunity to provide you with additional information about the drug screening process and our plans for implementing the program in the Service.

Some of you have raised concerns about the validity and reliability of drug screening programs. Articles which challenge the technical merits of drug testing have appeared in the press. In fact, there are unreliable drug test methods on the market that have been used in the past by private sector companies. Many of the stories that you may have read are based on incomplete testing methodologies, which can result in "false positive" findings.

If proper test procedures are utilized, drug screening methods are technically reliable and valid. We will be using only the best technology for the Customs drug screening program. Our technical methodology will use a two-tiered approach: all urine samples will be subject to an initial "immunoassay" test; those samples testing

positive will be further analyzed through a process known as gas chromatography/mass spectrometry (GC/MS). The use of GC/MS, which is a very sophisticated and precise process, provides the assurance that we will get accurate urinalysis reports.

I am also aware that many of you feel uneasy about the sample collection process. Proper sample collection is critical to the success of any drug screening program. Samples must be handled under strict "chain of custody" procedures, with the sample fully accounted for at every stage of the process.

The sample collection process in our program will insure that mix-ups cannot and will not happen. It is our intention to use trained professionals who are experienced in collection and chain of custody procedures. At the same time, without compromising the integrity of the collection process, we will make every effort to protect your privacy.

The program, which is scheduled for implementation this June, covers applicants (including employee applicants) who are tentatively selected for placement into a limited group of positions. Positions to be included in the drug screening program are those which meet one or more of the following criteria: direct involvement in drug interdiction and enforcement of related laws; a requirement that the incumbent carry firearms; or, a requirement for the incumbent to handle classified material.

Since we have a multitude of job titles and series in Customs, it is not possible to list every single position, along with its official title, which meets one of the above criteria. As positions are filled, the position description will be reviewed to determine if the responsibilities would require drug screening based on these criteria. The vacancy announcement for the position will then be annotated to show that the position is covered under the drug screening program.

The following is a list of the primary occupations which will be included in the drug screening program:

—Key management positions, including Commissioner, Deputy Commissioner, Assistant Commissioner, Comptroller, Regional Commisisoner, District/Area Director, Regional Director, Internal Affairs.

—Criminal Investigator positions; includes all positions under this job classification (Customs Investigator, Special Agent, Air Officer, etc.)

—Enforcement manager positions classified in series other than Investigator (e.g., Assistant Regional Commissioner, Enforcement)

—Customs Inspector positions

—Port Director positions

—Canine Enforcement Officer positions and related program manager, advisor positions

—Intelligence Research and related analyst positions

—Operational Enforcement Analyst positions

—Aircraft Pilot and Aviation Specialist positions

—Flight Engineer positions

—Detection Systems Specialist positions

—Radar Intercept Specialist positions

—Mail Specialist and Technician positions

—Positions not covered above, the incumbents of which handle classified material (includes many positions in Internal Affairs, other organizations and overseas; also includes Communications Specialists, Technicians, Operators, etc.)

—Positions whose incumbents have routine access to the office of the Commissioner

As stated earlier, the drug screening program relates to selections for covered positions. That is, drug screening will be required as a condition of placement/employment in the specified positions. This requirement will apply whether the individual is from inside the Service, another agency, or a new hire. When a candidate is tentatively selected for one of these positions, he/she will undergo drug screening prior to final selection, in the same manner as candidates who are required to undergo a medical or a background investigation.

You should note that the list of positions includes jobs filled at any grade of the occupation. Thus, positions of Senior Special Agent, Supervisory Inspector, etc., would be included, even if the tentative selectee is already in the job series. However, actions such as career ladder promotions within a particular series are not subject to drug screening—only job *changes*.

As you can see from the above description, many of you will not be involved with drug screening at all, unless you apply and are selected for a covered position. Further, if you are tentatively selected but you subsequently decide not to undergo drug screening, your refusal will only result in a loss of consideration for the position. No other action will be taken.

Many of you may still be reluctant to undergo drug screening. I believe that most people will overcome their reluctance when they fully understand the drug screening process and the intent of the program. I feel that this program will provide an opportunity for the entire workforce to see that drug screening is valid, reliable and an extremely effective deterrent against illegal drug use.

EXCERPT FROM ATTACHMENT 5

DRUG SCREENING FACT SHEET

Purpose: The purpose of the Customs drug screening program is to help ensure that the Customs workforce is drug-free. Since the primary Customs law enforcement mission is drug interdiction, the use of illegal drugs by employees cannot be tolerated.

Drugs which are included under the Customs drug screening program: marijuana, cocaine, amphetamines, opiates (includes heroin and morphine) and PCP.

Arranging an appointment: Within a few days of receiving your letter informing you that you have been tentatively selected by the U.S. Customs Service, you will be contacted by a local collection company representative who will set up an appointment with you for your drug test. The time and place of the drug test will be worked out between you and the company representative. Normally, you will be asked to report to a clinic located near your residence or place of business. In some cases, especially if you live in a remote geographic location and if a company representative is not located near you, the representative will travel to your location for the purpose of your drug test. In those cases, you and the representative will work out a meeting place of mutual convenience, such as a local hospital, clinic, or a public building such as a police station.

What to bring to your appointment:

1. Be sure to bring one of the following types of identification:

   * Driver's License with photo

   * Employee I.D. with photo

   * School I.D. with photo

   * Social Security Card with signature, if no photo identification is available

   No other types of I.D. are acceptable.

2. You should also bring any information relating to *any* prescription medications you are currently taking or have taken during the past thirty days such as a note from a doctor indicating such medications, or other prescription information including date of prescription, type of medication prescribed, medication concentration, frequency of use, date medication was last taken, prescription number, name of the physician prescribing the medication, and date of prescription.

Forms you will fill out as part *of the drug screening test*: After being greeted by the company representative, you will be asked to provide personal information to the representative including your name, address, age, etc. You will then have the opportunity to provide information relating to prescription medications you may be taking. The representative will also ask you if you have taken any over-the-counter medications or vitamins (this is because some over-the-counter medications and/or vitamins may affect urine color). You will also be asked to sign a statement indicating that you understand that if you test positive for illegal drugs you will lose consideration for the position for which you applied.

Please be assurred that your privacy will be protected in that the information provided by you on all drug screening forms will be released only to appropriate authorized officials.

The actual test: You will have maximum privacy when actually producing your sample. In other words observation will be "close" but not "direct". You will be asked to remove all outer garments such as coats and sweaters. In addition, if you are carrying a purse, you will not be allowed to bring the purse with you into the washroom.

(You will be allowed to carry your wallet with you into the washroom, however). After you have voided, you will come out of the stall or washroom and hand the sample bottle to the company representative. You will watch the representative place a label on the bottle identifying the sample as yours, and you will then watch the representative affix tamper-proof tape around the bottle. You will be asked to initial the tape.

If you decide to refuse to undergo drug testing: You have the right to refuse the urinalysis test at any time. We would ask that if you plan to refuse, you will do so before meeting with the company representative. You will lose consideration for the position you applied for if you refuse.

Drink liquids: To make it easy on yourself, it is recommended that you try to drink plenty of liquids before reporting for your test.

If you are currently a Customs employee and you test positive: A Customs employee who tests positive through drug screening may designate a laboratory for independent testing of a portion of the sample collected at the time of drug screening.

ATTACHMENT 6

CUSTOMS DIRECTIVE
POLICIES & PROCEDURES MANUAL
DRUG SCREENING PROGRAM

1. Purpose

   The purpose of this directive is to establish the Customs policies and procedures under which the drug screening program will be implemented.

2. Background

   The reason for initiating a drug screening program in the Customs Service relates directly to our mission. The use of illegal drugs has become a nationwide epidemic, and Customs is charged with the responsibility for stemming the tide of illicit drugs entering this country. As a result of our mission, Customs employees, more than many other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use. Many Customs employees are, by virtue of their assignments, in contact with this criminal element, as well as with illegal substances themselves. For these reasons, Customs has a special responsibility to insure that its workforce remains drug-free. Drug screening has proven to be an excellent deterrent to the use of illegal drugs. Further, when sophisticated laboratory methods are used, drug screening is technically valid and accurate.

3. Policy

   a. Drug screening through urinalysis is a condition of employment for placement into positions covered by the program. Candidates with confirmed positive test results from drug screening may be

subject to loss of consideration for the position applied for.

b. Confirmed positive test results from drug screening demonstrate use of illegal drugs. Consistent with the Customs Service Table of Offenses and Discipline (Policy and Procedures Manual Section 51752), and applicable laws and regulations, employees who improperly use illegal drugs may be subject to removal from the Customs Service. Any removal action initiated concerning bargaining unit employees will be taken in accordance with the terms of the National Agreement in effect between the National Treasury Employees Union and the U.S. Customs Service.

4. Scope

The drug screening program, as outlined in this directive is limited to drug testing through urinalysis of any candidate tentatively selected for any position covered by the program as described in Section 5: Position Coverage. Drug screening is not required when the applicant is tentatively selected for reassignment or detailed to the same position in a different organization or location. For example a GS-9 Inspector who is reassigned to another GS-9 Inspector position, is not subject to drug screening; a Customs Investigator detailed to a special enforcement team would also not be subject to drug screening. Drug screening is required for any change in position, and any competitive staffing action, when such action would result in placement in a position covered by the program.

The Customs drug screening program does not include the random testing of employees.

5. Position Coverage

Positions have been identified for inclusion in the drug screening program if they meet one or more of

the following criteria for position coverage: direct involvement with drug interdiction and enforcement of related laws; a requirement that the incumbent carry firearms; or, a requirement for the incumbent to handle classified material.

Current incumbents of covered positions are not required to undergo drug screening. The positions come under the drug screening program only as they become vacant, at which point the tentative selectee is subject to drug screening.

Positions at all grades and types of appointments of a covered occupation are included. For example, supervisory and senior vacancies of a covered occupation are subject to drug screening, along with entry level positions.

A general list of positions covered by drug screening appears as Appendix 1. However, due to the multitude of job titles in Customs, it is not possible to list every position covered by the program. As positions become vacant, their duties and responsibilities will be reviewed to determine whether they should be included under the drug screening program.

6. Definitions

a. *Immunoassay*: A technique commonly used in drug screening to detect the presence of drugs in urine. This test uses drug-specific antibodies to discriminate between positive and negative samples.

b. *Gas Chromatography/Mass Spectrometry (GC/MS)*: An analytical technique which may be used as a confirmation test in urinalysis. GC/MS confirms the identity and concentration level of a compond by comparing its unique fragmentation spectrum and response to that of an analytical standard.

7. Responsibilities

   a. The Office of the Comptroller, Office of Human Resources has overall program responsibility for the drug screening program, which includes:

      (1) determining positions which are covered by the program;

      (2) Authorizing the collection of urine specimens for individuals tentatively selected in covered positions;

      (3) obtaining technical interpretations of positive test results;

      (4) advising and assisting managers in taking appropriate disciplinary actions related to positive findings.

   b. The Office of Internal Affairs is responsible for making suitability determinations resulting from positive urinalysis findings.

   c. The Office of Commercial Operations, Office of Trade Operations, Technical Services Division is responsible for contracting and/or operating drug testing laboratories with sufficient capacity to meet Customs drug testing requirements.

      The Technical Services Division is responsible for monitoring the performance of a contract laboratory through a quality assurance program.

8. Procedures

   a. Notification

      At the time of notification of tentative selection for a position covered by the program, tentative selectees will be advised that their final selection and placement into a position is contingent upon successful completion of drug screening through

urinalysis (and any other pre-employment/placement conditions such as medical examination, background investigation, etc.).

Customs employees who are members of the bargaining unit may elect to have a union representative notified at the time of tentative selection for a position covered by the drug screening program. Appendix 2 contains the form (Authorization or Notification of Tentative Selection) to be used to authorize and request this notification. It is the responsibility of the (unit) employee to address and submit this form along with the SF-171, at the time of application for a position covered by the drug screening program. The submission of this form will result in the notification of a designated union representative of a candidate's tentative selection at the same time the candidate is notified.

b. Appointment Scheduling

The Drug Screening Coordinator will be notified of all tentative selections for which drug screening is required. After allowing for receipt of written notification of tentative selection (no sooner than five calendar days) tentative selectees will be contacted by a Customs Drug Screening Coordinator or by a representative from a contracted company to make arrangements for sample collection.

c. Sample Collection

The guidelines described below will be used in the collection process:

(1) The subject (tentative selectee) may be asked to report to a collection location. However, if the collector is not located within reasonable geographic proximity to the subject, or for other reasons (such as a large

number of people being tested from the same work location) the collector may come to the subject's location, or the collector may arrange an alternate location for sample collection.

(2) When met by the collector, the subject will be asked to show a photo identification. If the applicant does not have one of the types of identification listed below, he/she will be asked to reschedule the appointment. Drug screening will not take place without proper identification.

Acceptable I.D.s are:

- Driver's License with photo
- Employee I.D. with photo
- School I.D. with photo
- Social Security Card with signature, if no photo identification is available

No other types of I.D. are acceptable.

(3) After identification is made, the subject will be required to provide the following information which will be recorded on a pre-test form:

Name
Address
Current Job Title/Employer
Social Security Number
Age/Sex
Date of Birth
Telephone Number

The subject will then be asked to fill out a second form which requests the following information:

Name
Social Security Number
Medications taken within the last thirty days (the disclosure of this information is voluntary)

The subject will also be asked to explain any circumstances in which he/she may have been in legitimate contact with illegal substances over the last thirty days.

The subject will be asked to sign a statement which indicates that he/she understands the ramifications of drug screening positive results.

(4) Once the pre-test form has been completed, the subject will be asked to remove his/her outer garments (coats, jackets, etc.). In addition, all personal belongings must remain with the outer garments. The subject may retain his/her wallet. No outer garments or personal belongings (purses, bags, etc.) can be taken into the restroom while the subject voids.

(5) When the testing takes place, the following procedures will be used. Observation will be "close" but not "direct." That is, the contractor shall not directly observe the voiding "body to bottle". Instead, at the collector's location, precautions will be taken to prevent sample adulteration.

(6) Upon receiving the specimen bottle back from the subject, the collector will ensure it contains sufficient urine volume. If there is not enough urine volume in the bottle, additional urine will need to be collected.

(7) If the subject is unable to void at the appointment time, or if the amount of urine voided is not sufficient:

a. The subject will be given coffee or water to drink. The subject should void within the hour.

b. If he/she is unable to void, the subject will be asked to return within a reasonable period of time during the same day.

c. If, after this period of time, the subject still cannot void, the inability to produce a sample will result in loss of consideration for the position applied for.

d. Chain of Custody

(1) After the urine specimen is collected, the subject must immediately hand the specimen to the collector. If the specimen is unusually hot or cold, another specimen will be collected.

(2) A tamper-proof custody seal will be affixed over the top of the bottle cap and down the opposite sides of the bottle. A urine identification label will be completed and placed around the base of the bottle, making certain it covers both ends of the tamper-proof custody seal.

(3) The subject will be asked to read a certification statement, certifying that the urine in the bottle came from his/her body, and then sign his/her signature on the chain of custody form.

(4) The subject is asked again to show proof of identification to insure that the signature matches.

(5) The collector witnesses the initial on the tamper-proof seal, and the signature on the custody form, by signing his/her name and professional credentials.

(6) All urine specimens will be placed in plastic bags. The bags will be sealed tightly and placed in mailing envelopes. The completed chain of custody form will be folded in quarters and wrapped around the plastic bags. The form will be secured to the bottle.

(7) The Drug Screening Pre-test Form will be placed in a sealed envelope. The subject's social security number will be written on the outside of the envelope. The envelope will be sent to the Customs Drug Screening Coordinator. This envelope will not be opened unless there is a positive finding, in which case, any information provided on the Pre-test Form (such as prescription drugs taken, or legitimate contact with illegal substances), will be analyzed to determine its impact on the test results.

The envelope containing the Pre-test Form will be destroyed by the Drug Screening Coordinator if the drug screening test is negative.

(8) The specimen will be mailed to the laboratory.

e. Laboratory Procedures/Laboratory Reporting

(1) The contractor uses a combination form which includes both custody documentation and acts as a laboratory requisition. This ensures that all of the necessary information about a particular specimen arrives at the laboratory at the same time as a urine specimen.

(2) The laboratory will follow appropriate chain of custody procedures throughout the period the sample is being tested.

(3) After testing, negative samples will be discarded by the laboratory. Only samples testing positive after both the screening and confirmation tests will be considered positive. Positive samples will be retained at the laboratory in a frozen state, until the Drug Screening Coordinator directs them to be destroyed.

(4) The laboratory shall report the results of the testing to the Drug Screening Coordinator.

9. Technical Methodology

a. Range of Drugs

Drugs which will be tested for are as follows: Marijuana (cannabinoids), Cocaine, Opiates, Amphetamines, and Phencyclidine.

b. Technical Protocol

The technical protocol for the Customs drug screening program is a screening test using immunoassay. Samples testing positive will undergo a confirmation test using gas chromatography/mass spectrometry.

c. Quality Assurance Program

Blind quality assurance samples will randomly be intermingled with the specimen samples and analyzed in the same manner as actual specimens. Blind samples will be provided by the Technical Services Division to monitor the performance of the contractor.

10. Personnel Policies

a. Advance Notification

Whenever possible, vacancy announcements and other recruiting notices will state if a position requires the successful completion of drug testing prior to final placement in the position. An applicant who is tentatively selected for a position will be notified in advance, in writing of the drug testing requirement.

b. Sample Adulteration

Any attempt to substitute another person's urine for one's own, adulterate a sample, or fraudulently affect reported results will result in disciplinary/adverse action under P&PM Section 51752.

c. Negative Findings

Negative findings (no illegal drugs in the urine) will be reported telephonically by the Office of Human Resources to the tentative selectee.

d. Positive Findings

(1) Post-Test Follow-up

A. The Drug Screening Pre-test Form of any subject testing positive will be reviewed to determine if the use of prescription drugs was indicated.

If the information on the Pre-test Form is sufficient to determine that the test results are consistent with the ingestion of the prescription drugs as described by the subject, rather than the use of illegal drugs, the technical assessment will be documented accordingly, and the tentative selectee will be notified that the results were negative for drug screening purposes.

If the information on the Pre-test Form is relevant but insufficient to determine the impact of the medications upon the test results, the subject will be notified in writing by the Office of Human Resources and asked to provide evidence of prescriptions taken (i.e., prescription number, prescription date, and/or a Doctor's certificate stating that the subject was taking the medication).

B. The Pre-test Form of any subject testing positive will be reviewed for information concerning legitimate contact with illegal drugs. If the subject indicated on the Pre-test Form that he/she was in legitimate contact with illegal drugs within the last 30 days, the subject will be asked to submit documentation from his/her supervisor which verifies this contact. Once this documentation is received, the Office of Human Resources may request that the Office of Internal Affairs verify the information.

C. An evaluation will be made, with appropriate assistance from technical experts, of all information provided in connection with the injection of prescription drugs and/or legitimate contact with illegal substances in order to interpret the test results. Candidates will be notified in writing of all interpretations.

(2) Notification of Positive Findings

As indicated above, Customs employees who test positive and whose Pre-Test Form contains relevant information on the use of prescription drugs and/or the legitimate contact with illegal substances, will be notified in writing of the technical interpretation of

their test results. In addition, Customs employees who test positive but whose Pre-Test Form does not contain relevant information will receive written notification of the positive finding.

(3) Independent Testing—Positive Findings

A Customs employee who tests positive through drug screening may designate a laboratory for independent testing of a portion of the sample collected at the time of drug screening. In such instances, the laboratory used by Customs will send a portion of the original sample to a laboratory designated by the employee. Such requests must be made in writing and should be submitted to the Customs Drug Screening Coordinator.

(4) Actions Taken: Non-Customs Candidates

Tentative selectees who test positive through drug screening will be referred to the Assistant Commissioner (Internal Affairs) for a suitability determination, as appropriate. If found unsuitable, they will lose consideration for the position applied for.

(5) Actions Taken: Customs Candidates

Customs employees who test positive through drug screening are subject to loss of consideration for the position applied for. In addition, since confirmed positive test results demonstrates use of illegal drugs, consistent with the Customs Service Table of Offenses and Discipline (Policy and Procedures Manual Section 51752), and applicable laws and regulations, employees who use illegal drugs are subject to removal from the Service.

A Customs employee who does not wish to challenge a positive finding, may voluntarily resign. If the employee submits a resignation before receipt of an adverse action proposal, the Standard Form 50 documenting the employee's resignation will indicate that the employee resigned for personal reasons and no additional agency findings relating to the reason for resignation will be included on the form.

e. Refusals

Any tentative selectee who refuses to undergo drug screening in conjunction with an employment opportunity will lose consideration for that position. Subsequent applications will not be affected by a refusal. No adverse actions will be taken against an employee who refuses, nor will any documentation adversely affecting subsequent applications be maintained.

11. System of Records/Privacy Act

Records generated by the drug screening program will be maintained in system of records OPM/GOVT-5, and OPM/GOVT-10. All records will be maintained in accordance with the Privacy Act.

Commissioner of Customs

Appendix 1

Customs Drug Screening Program

Positions Covered

Criteria for position coverage: direct involvement with drug interdiction and enforcement of related laws; a requirement that the incumbent carry firearms; or, a requirement for the incumbent to handle classified material.

The following positions meet one of the above criteria and will therefore require drug screening as a condition of placement/employment into the position. It should be noted that current incumbents of the positions are not required to undergo drug screening. The positions come under the drug screening program only as they become vacant, at which point the tentative selectee is subject to drug screening.

It should also be noted that positions at all grades of the listed occupations are covered; supervisory/senior jobs of a listed occupation are also covered.

Specific Positions

Commissioner
Deputy Commissioner
Assistant Commissioner
Deputy Assistant Commissioner (Enforcement)
Deputy Assistant Commissioner (Inspection and Control)
Regional Commissioner
Deputy Regional Commissioner
Assistant Regional Commissioner (Enforcement)
Deputy Assistant Regional Commissioner (Enforcement)
Director, Enforcement Support
Director, Office of Intelligence

Regional Director (Internal Affairs)
District/Area Director
Deputy District/Area Director
Assistant District/Area Director
(Inspection and Control)
Port Director
Criminal Investigator (includes Customs
Investigator, Special Agent, Air Officer,
all senior/supervisory)
Intelligence Research Specialist
Intelligence Operations Specialist
Intelligence Management Specialist
Enforcement Coordinator
Enforcement Operations Specialist
Enforcement Program Specialist, Officer
Enforcement Support Specialist, Officer
Enforcement Analyst, Officer
Operational Analysis Specialist, Officer
Operational Enforcement Analyst
Chemist
Customs Inspector (includes senior/supervisory, etc.)
Interdiction Program Officer
Canine Enforcement Officer (includes related
program manager, advisor positions)
Firearms Control Specialist
Radar Intercept Specialist
Communications Security Analyst
Communications Management Specialist
Communications Manager
Communications Control Technician
Communications Equipment Operator
Communications Technician
Communications/Radar Controller
Communications Relay Operator
Air Interdiction Manager
Aviation Group Supervisor
Enforcement Aviation Administrator, Manager,
Specialist

Aviation Management Specialist
Pilot
Flight Engineer
Detection Systems Specialist
Customs Mail Specialist
Customs Mail Technician
Seizure Clerk
Personnel Security Specialist, Officer
Polygraph Program Coordinator
Equipment Specialist

General Position Coverage

The following groups of positions are more readily listed by an organizational description, rather than by specific titles.

All overseas positions (Customs Attaches, Customs Representatives, all others)
All positions with routine access to the Office of the Commissioner
Cooperative Education student trainees assigned to the enforcement or intelligence functions
Positions not covered above, the incumbents of which handle classified material (includes many positions in Internal Affairs and other organizations)
Positions with custodial responsibility for drug seizures

Appendix 2

Authorization for Notification of Tentative Selection
(applicable to Customs employees in the bargaining unit)

If you are tentatively selected for a position which requires drug screening, and you are a Customs employee in the bargaining unit represented by the National Treasury Employees Union, you may receive information from your union representative regarding the drug screening test. If you wish to have your union representative notified of your tentative selection, please sign and date this

form and fill in the name and address of your union Chapter President (or other appropriate union representative) in the space designated below.

This form must be completed properly and *attached to your application* (SF 171) for the position requiring drug screening. If you follow these procedures, and are subsequently tentatively selected for the position, the personnel office will send this form to your designated union representative at the same time that you are notified of your tentative selection. It is important that you fill in the name of your representative neatly and accurately, since it will be used as the address for mailing in a window envelope.

My signature below authorizes the Customs Service to notify the union representative designated below of my tentative selection for a position requiring drug screening. I understand that in order for this notification to occur, I am required to complete the name and address of my designated representative and attach this form to my SF 171 which I file for the covered position.

_____

Print Name

_____

Position Applied For/Vacancy Announcement Number

_____

Employee Signature

_____

Date

Union Representative Name and Address

_____

_____

_____

_____

U.S. CUSTOMS SERVICE DRUG SCREENING PROGRAM: DRUG PANEL

DRUG	EMMIT SCREENING LEVEL (ng)	GC/MS CONFIRMATION LEVEL (ng)
MARIJUANA	100	20
COCAINE	300	300
AMPHETAMINES	1000	500
PCP	75	75
OPIATES	300	300

LIST OF CRITICAL-SENSITIVE POSITIONS

All employees in the Commissioner's and Deputy Commissioner's offices (temporary and permanent)

Consultants to the Commissioner or Deputy Commissioner

GS-14's and above (All)

Supervisory and/or Executive Management Positions

Consultants in any capacity equivalent to a GS-14 and above which normally requires a background investigation

EX: ADP Consultants
Security or Intelligence Managers
Electronic Engineers/Research

Positions Overseas (All)
Positions in Enforcement (All)
Positions in Research and Development (All)
Positions in the Office of Internal Affairs (All)

Accountant
Accounting Technician
Animal Caretaker
Attorney (All)
Auditor (All)
Aviation Maintenance Inspector or Specialist
Baggage Clerk
Canine Enforcement Officer
Canine Program Advisor
Cashier/Teller/Imprest Fund Clerk
Chemist
Co-op Student (All)
Commodity Control Specialist/Assistant
Communications Equipment Operator or Specialist
Communications Manager
Communications Radar Controller or Specialist
Communications Relay Operator
Communications Specialist and Technician
Congressional Liaison Officer or Specialist
Contract Procurement Specialist

Contract Specialist/Administrator
Custodian (Classified Documents)
Customs Aid/Clerk
Customs Air Officer/Pilot (regardless of collateral duties) (All)
Customs Attache/Representative/Advisor
Customs Inspector (All)
Customs Patrol Officer or Marine Officer (All)
Detection Systems Specialist
Disclosure Technician
District Director (All)
Electric Equipment Repairer
Electronic Engineer, Technician or Mechanic
Entry Aid/Assistant
Entry Control Officer
Fines, Penalties and Forfeiture Clerk/Examiner/Specialist
Firearms Control Specialist
Flight Engineer
Food Service Worker (Commissioner's dining room)
Guard
Import Control Officer
Import Specialist
Inspectional Aid/Assistant
Intelligence Positions (All)
Lab Technician/Aid
Law Clerk
License Specialist
Mail Clerk/Assistant
Mail Technician/Specialist
Medical Officer
Messenger
Motor Vehicle Operator
National Firearms Coordinator
Operations Analyst or Officer
Paralegal Specialist
Payroll Technician
Physical Science Administrator

Physical Scientist
Physical Security Specialist
Polygraph Coordinator/Examiner
Port Director (All)
Procurement Analyst
Procurement Clerk
Property Clerk/Seizure Clerk
Radar Intercept Specialist
Radar Technician
Regional Commissioner's Secretaries
Safety Specialist
Secretary or Clerk with collateral TECS duties
Secretary or Clerk/Custodian (Classified Documents)
Seizure Clerk
Special Agent/Customs Investigator (All)
Supervisory Computer Equipment Analyst
Supervisory Computer Specialist
Supervisory Computer Systems Analyst
Textile Technician/Analyst
Voucher Examiner
Warehouse Officer

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
Washington

[SEAL]

Refer to
PER-1-CM:HR

October 15, 1986

Mr. John McEleney
Assistant Director of Negotiations
National Treasury Employees Union
1730 K St. N.W.—Suite 1101
Washington, D.C. 20006

Dear Mr. McEleney:

This is to advise you that the Department has reviewed the Agreement in effect between Customs and NTEU concerning drug screening. They have determined that portions of the agreement are in violation of law and/or regulations. Therefore, we are striking the following paragraphs from the Agreement: 3, 4, 16, 18, 23, 24, and 25. The paragraphs on the attached copy of the Agreement have been numbered for your convenience.

/s/ Robert M. Smith
ROBERT M. SMITH
Deputy Director
Office of Human Resources

The following constitutes the agreement reached between the U.S. Customs Service and the National Treasury Employees Union as a result of impact and implementation bargaining on the Customs Drug Screening Program:

1. The Drug Screening Directive has been changed in Section 3.a. from "are subject to" to "may be subject to".

2. Section 3.b. of the Directive has been modified as follows: Consistent with the Customs Service Table of Offenses and Discipline (Policy and Procedures Manual Section 51752), and applicable laws and regulations, employees who improperly use illegal drugs may be subject to removal from the Customs Service. Any removal action initiated concerning bargaining unit employees will be taken in accordance with the terms of the National Agreement in effect between the National Treasury Employees Union and the U.S. Customs Service.

3. The following sentences have been added to Section 4 of the Directive, Paragraph 1:

4. Drug screening is not required when the applicant is tentatively selected for reassignment or detailed to the same position in a different organization or location. For example, a GS-9 Inspector who is reassigned to another GS-9 Inspector position, is not subject to drug screening; a Customs Investigator detailed to a special enforcement team would also not be subject to drug screening. Drug screening is required for any change in position, and any competitive staffing action, when such action would result in placement in a position covered by the program.

5. The list of positions covered by the drug screening program has been included as Appendix 1 to the drug screening Directive.

6. The union will be notified in advance if positions are added or deleted from coverage of the program.

7. An extra copy of any proposal letter given to a bargaining unit employee whose drug screening test results indicate the improper use of illegal drugs will be provided to the employee with the statement that "This copy may at your option be furnished to your NTEU representative".

8. Attached is an information package consisting of: a sample letter of tentative selection, pre-test form, chain of custody form and the Drug Screening Fact Sheet.

9. The union was provided with a copy of the quality assurance program to be followed by the Technical Services Division to insure the integrity of the Program. A copy of the contractor's quality assurance program will be provided to the union.

10. The Directive has been modified (Section 8.b.) to add information on the process by which a candidate tentatively selected for covered positions is contacted to arrange for his/her drug screening, and the role of the Drug Screening Coordinator in facilitating this contact.

11. Bargaining unit employees may request that their designated union representative be notified if they are tentatively selected for a position covered by the drug screening program. The purpose of this notification is to provide the employee with the opportunity to obtain information from his/her union representative regarding drug screening. Notification of the employee's union representative will occur if the employee completes and transmits an authorization form at the time he/she applies for a position covered by the drug screening program. The authorization form serves as the request for notification of the representative if the employee is tentatively selected.

12. On the Authorization for Notification of Tentative Selection, the employee requests that his/her desig-

nated union representative be notified if he/she is tentatively selected for a position covered by the drug screening program. It will be the responsibility of the employee to properly address the form to the designated union representative. If the employee has submitted the form and is tentatively selected for a position covered by the drug screening program, the staffing specialist will place the form in the mail at the same time the letter notifying the employee of the tentative selection is placed in the mail.

13. The Directive has been modified to reflect this procedure (Section 8.a.); the Authorization for Notification of Tentative Selection form is attached to the Directive for employees' use.

14. Any meetings between an NTEU representative and a bargaining unit employee tentatively selected for a position covered by the drug screening program will not delay a drug screening test. Reasonable time will be provided for such meetings.

15. Employees will not be charged for any leave when they provide samples for drug screening purposes. Mileage incurred as a result of traveling to a designated collection site may be reimbursed in accordance with applicable travel regulations.

16. If the selectee chooses not to participate in the Program, he/she will not be subject to any disciplinary or adverse action. The Customs Service will not maintain any records associated solely with individuals who refuse drug screening. This does not preclude Customs from maintaining the necessary documentation for merit promotion case files. Subsequent applications will not be affected by a refusal. (Section 10.e. of Directive)

17. Any pre-test forms signed by the selectee will not serve to indicate concurrence with a positive drug screening analysis. A sample copy of the pre-test

form will be provided in advance to the tentative selectee at the time of notification.

18. The selectee will be permitted to deliver the sample in private without direct observation. (Section 8.c. of Directive)

19. A bargaining unit employee will be provided with complete chain of custody information if he/she tests positive and receives a letter proposing his/her removal from the Service. An extra copy of the chain of custody material will be provided along with the statement "This copy may at your option be furnished to your NTEU representative."

20. The Office of Human Resources will notify selectees of negative test results telephonically. Notification of all positive test results will be communicated in writing. The Directive has been modified to incorporate these provisions (Sections 10.c. and d.).

21. Upon request, the laboratory used by Customs will provide a laboratory designated by an employee whose urine test is found to be positive (and who is determined to have improperly used illegal substances) with a portion of the original sample to permit the employee to acquire another laboratory test. This right will be made known to the tentative selectee by incorporation into the U.S. Customs Service Drug Screening Fact Sheet which will be provided at the time of written notification of tentative selection. These provisions have been incorporated into the Directive (Section 10.d.).

22. The Customs Service will review the list of critical-sensitive positions dated April 8, 1986, and provided to NTEU on July 17, 1986, and reconsider the accuracy of its contents. Immediately following the review, Customs will provide NTEU with a copy of the revised list and an explanation of its reasoning

for the inclusion of all bargaining unit employees. Current position descriptions will also be provided.

23. If the report is positive and the employee does not wish to challenge its findings, the employee may voluntarily resign. If the employee submits a resignation before receipt of an adverse action proposal, the Standard Form 50 documenting the employee's resignation will indicate that the employee resigned for personal reasons and no additional agency findings relating to the reason for resignation will be included on the form. These provisions have been incorporated into the Directive (Section 10.d.).

24. The cutoff levels for all drugs included in the Custom Drug Screening Program should be set in such a manner so as to decrease the possibility of a false positive result due to operating the assay too close to its level of sensitivity or from passive inhalation. The cutoff levels of all drugs included in the Program will be made known to the union. (These were provided to the union on July 17, 1986.) The union will be notified in advance of any changes proposed in the assay sensitivity and/or cutoff levels.

25. A finding which may result following the initial screening will be reported as negative unless a confirmation assay consisting of gas chromatography coupled with mas spectrometry (GC/MS) also reveals the presence of drugs above the cutoff levels. (Section 8.c. of Directive)

26. The Customs Service will provide a copy of the Directive entitled "Drug Screening Program" to all bargaining unit employees.

27. Reports from all internal and external quality assurance programs will be provided to the union.

28. If the drug screening results of a tentative selectee occupying a non-critical sensitive or non-sensitive position are positive, at the time Customs notifies the

employee of the results, it will also notify the employee of the existence of Public Law 91-616 and Public Law 92-255. Employees may contact their Employee Relations Specialist for information concerning available rehabilitation/counseling services available through the Customs Service.

For the U.S. Customs Service:

/s/ Robert M. Smith
ROBERT M. SMITH
Deputy Director
Office of Human Resources
U.S. Customs Service

For the National Treasury Employees Union:

/s/ Robert M. Tobias
ROBERT M. TOBIAS
National President
National Treasury
Employees Union

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3522
Consolidated with 86-4058

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiffs,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Defendant.

AFFIDAVIT OF JOHN McELENEY

I, John McEleney, hereby declare as follows:

1. My name is John McEleney, and I am Assistant Director of Negotiations for the National Treasury Employees Union (NTEU). For the past seven years I have been NTEU's chief negotiator in dealings with the U.S. Customs Service. In that capacity, I am NTEU's spokesperson in the negotiation of collective bargaining agreements with Customs, as well as the overseer and coordinator of the entire labor management program at Customs nationwide. I am in constant communication with NTEU representatives in the field who deal with issues of concern to Customs employees on a daily basis.

2. During my entire tenure as NTEU's chief negotiator with Customs, I have been aware of only a handful of instances in which employees have been disciplined or reprimanded for the use of illegal drugs, either on or off duty. I am aware of no cases in which use of illegal drugs was connected to any accident or safety mishap. In short, I have no reason to believe that there is any cognizable problem amongst Customs employees concerning use of illegal drugs, either on or off duty.

3. After Customs first issued its drug screening directive, on June 16, 1985, NTEU engaged in negotiations with Customs concerning the impact and implementation of the plan. I was NTEU's spokesperson during the negotiations, which were conducted in late June and early July of 1986.

4. During the negotiations, I requested that Customs provide NTEU with information detailing the instances of use of drugs amongst Customs employees, drug abuse related discipline, and similar information to substantiate the need for a drug screening program. At that time I was informed by Robert Smith, Deputy Director, Office of Human Resources, that this data would be difficult to retrieve and that if we withdrew our request for information, Customs would be willing to stipulate that there is no drug problem amongst its employees, and that drug screening was not being implemented to respond to a perceived employee drug problem.

I swear under penalty of perjury that the foregoing is true and correct.

October 14, 1986
Date

/s/ John McEleney
JOHN MCELENEY

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3522
Consolidated with 86-4058

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiffs,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Defendant.

AFFIDAVIT OF LEE CRUZ

I, Lee Cruz, hereby declare as follows:

1. My name is Lee Cruz. I am a Customs Inspector in Laredo, Texas, and have been employed by the Customs Service since 1980. Before 1980 I had been a Border Patrol Agent for five years.

2. In August of 1986, I received notification that I had been selected for promotion to a Senior Customs Inspector, grade 11, in Laredo, Texas. Promotion to the senior inspector position is based on merit, and is the highest non-supervisory position a Customs Inspector can attain. I, like many other inspectors, view obtaining this position as an important accomplishment in my career advancement. The position draws a higher salary and involves greater responsibility than lower graded Customs inspector positions. It is also a valuable experience for any inspector interested in attaining management status.

3. The letter of selection I received stated that my placement in the Senior Inspector position was contingent on my submission to urinalysis testing to screen for use of illegal drugs, and my passage of that test. The letter explained that I would be contacted to schedule collection

of my sample, and that I should be prepared to disclose any medications I was taking at the time I submitted my sample.

4. About two and one half weeks after I received notice of my selection, the Chief Inspector notified me that I was required to report to the Customs District Office the next day, for collection of my urine sample in the men's room.

5. The next day I reported to the District Office at about 9:00 a.m. Three other persons were also there to submit samples for drug testing. Two of these persons were Fred Robinson and Benito Juarez. Robinson and Juarez had been selected as Senior Inspectors along with me. It is my understanding that Mr. Robinson was not scheduled to work that day, but had been ordered to report to submit his sample on his day off.

6. All of us waited at the District Office until about 12 noon, when the laboratory representative finally arrived.

7. The laboratory representative asked me whether I was taking any medications or whether I had been in contact with any illegal drugs during the course of my work in the last 30 days. I told him that I had been taking Ampicillin (an antibiotic) and Lomatil (for a stomach disorder). I also told him that I had been in contact with marijuana as part of my duties in the previous month.

8. The laboratory representative accompanied each of us into the restroom, one by one. He placed some dye into the urinal and then stepped behind a partition. The representative was able to observe me from my shoulders up from behind the partition while I urinated into the sample jar. I found this procedure embarrassing.

9. After I finished urinating, the laboratory representative took the jar, sealed it, and labelled it with my name.

10. Benito Juarez and Fred Robinson also submitted urine samples that day. They each went into the rest-

room before me. It is my understanding from conversations with them that Fred Robinson went first. I understand that Benito Juarez noticed that the laboratory representative initially mislabelled his sample, by putting Fred Robinson's name on it. When Benito alerted the representative, he corrected his error.

11. About two and one half weeks after I submitted my sample, the Chief Inspector notified me when I reported to work that I had "passed" the urine test, and that my selection would be finalized.

12. I found the urine collection process embarrassing and unnecessary, and I believe it violated my civil rights. I did not voluntarily submit to the test, but did so only because if I did not, I would not have received the promotion I earned, and my career would have suffered. I have been employed for the last ten years by the Customs Service and Border Patrol enforcing the criminal laws against illegal drugs. I have always performed this work honestly and to the best of my ability, and I have a good work record. When I came to work for Customs, I never expected to have to submit to drug tests to prove that I do not use the very substances I have spent the last ten years trying to combat. I thought the test was an invasion of my privacy and an insult to my professionalism.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

10/21/86
Date

/s/ Lee Cruz
LEE CRUZ

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3522
Consolidated with 86-4058

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiffs,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Defendant.

AFFIDAVIT OF BENITO D. JUAREZ

I, Benito D. Juarez hereby declare as follows:

1. My name is Benito D. Juarez. I am a Customs Inspector in Laredo, Texas.

2. In August of 1986, I received notification that I had been selected for promotion to Senior Customs Inspector, Grade 11, in Laredo, Texas. Promotion to the senior inspector position is based on merit, and is the highest non-supervisory position a Customs inspector can attain.

3. When I was notified of my tentative selection to be a senior inspector, I was informed that I would have to take a urine test in order to actually receive my promotion.

4. Several weeks later I was contacted by the Chief Inspector and scheduled to submit a sample at the Customs District Office.

5. On the appointed day, I reported to the District Office in the morning. Lee Cruz and Fred Robinson were also there that day to submit urine samples.

6. We waited several hours at the District Office for the laboratory representative, who was late, to arrive.

During this period, I was very uncomfortable because I could not go to the bathroom, since I had to be able to provide a urine sample when the representative arrived.

7. When the laboratory representative arrived, he was obviously in a hurry and said so. He complained that the drive to the District Office was longer than he expected. The laboratory representative also said that this was the first time he had collected urine samples, that he was not experieced at it, and that his previous job was as an insurance adjuster.

8. The urine samples were collected in the men's room. I was the second person in, after Fred Robinson.

9. The laboratory representative remained in the bathroom with me while I urinated into the bottle at an open urinal. He was not to my knowledge behind a stall or partition. I had my back to the laboratory representative during this process, and so do not know how closely he was observing me.

10. After I urinated, I noticed that the laboratory representative was affixing a sticker to my sample bottle. The sticker he was affixing had the wrong social security number on it. He had already filled out the labels before collecting our samples, and apparently he placed Fred Robinson's sticker on my bottle. When I alerted him to his mistake, he went back and checked his papers to determine my social security number and then corrected his error.

11. About one month after I submitted my sample, I was notified that I had passed the test and my selection would be finalized.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Oct. 18, 1986
Date

/s/ Benito D. Juarez
BENITO D. JUAREZ

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3522
Consolidated with 86-4058

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiffs,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Defendant.

AFFIDAVIT OF JOHN P. MORGAN, M.D.

I, John P. Morgan, M.D., hereby declare as follows:

1. My name is John P. Morgan. I am a Medical Professor and Director of the Pharmacology Program of the City University of New York Medical School. I have passed the certification examination of the American Medical Society on Alcoholism and Other Drug Dependencies, and have authored approximately 70 published articles and books focused on issues of alcohol and drug abuse. In 1985 I published a curricular guide on drug abuse for pharmacology faculty on the clinical pharmacology of alcohol and drugs of abuse. The National Clearinghouse for Alcohol Information has distributed this text to all American and Canadian medical school departments of Pharmacology. My experience, education, and publications are set out in my *curriculum vitae*.

2. I am familiar with, have studied, and have written published articles concerning the use of urine testing to screen for the use of illegal drugs. In particular, I am familiar with the Enzyme Multiplied Immunoassay

Technique (EMIT) test, marketed by Syva Company, and with the Gas Chromatography/Mass Spectrometry method of urinalysis.

3. Problems in the accuracy of urine testing begin with sample collection. An individual who is knowledgeable about the issues of testing can thwart the test completely, by substituting another individual's (presumably clean) urine, for his own. Additionally, when the EMIT test is used as an initial screen, an individual may alter his or her sample with a variety of contaminants (table salt, hand soap) which will disrupt the required chemical methodology, and render a negative result. These opportunities to switch and doctor urine simply mean that in order to say with any assurance that a negative test result correlates with the non-use of drugs, the urinary stream must be carefully observed in its passage from the bodily oriface to the collection vessel. The observer must have his or her eyes within inches of the process. In other words, the passage of urine for testing must be accompanied by humiliating observation—there is no other way. In my experience, it is common for the demand for urine to be placed but it is not at all common for "proper" close observation to be carried out. This, of course, means that knowledgeable drug abusers will beat the test while those more naive will yield up honest specimens.

4. Urinary tests for drugs do not measure impairment. There is virtually no proven correlation between any positive urinary test for drugs and observed or assesed human behavior.

5. At best, urinary tests can detect whether persons have ingested drugs in the recent past. Although results may vary depending on metabolism and fluid intake, cocaine, amphetamine and opiates become undetectable after several days in almost all cases. Except in the case of the chronic users, marijuana usually becomes undetectable within two to five days. Therefore, must substance abusing individuals who have notice that they will be tested can avoid a positive result, simply by abstaining. Given a week's notice, generally only addicts or the most chronic users would not be able to produce a clean sample. It is likely that misuse of drugs by such persons would have already manifested itself in behavior, absenteeism, or poor performance.

6. The EMIT test has a high false positive rate. In my experience, the test produces a false (or unconfirmed) positive 10-15% of the time. Because the incidence of true positives will probably not exceed 5% (most for marijuana metabolite), this means that many positives will be false positives.

7. False positives are caused by a variety of factors, including the phenomenon of "cross-reactivity." For the EMIT test, the opoid screen will react not only with heroin, but with morphine, methadone, codeine, and other drugs. The amphetamine screen will react with over-the-counter nasal decongestants ephedrine and phenylpropanolamine. The benzodiazapine antibody will give a positive reaction with the most widely employed prescription sleeping pill in the United States and the barbiturate screen will detect phenobarbital still widely employed in epilepsy. The EMIT test is susceptible to further problems because the detection of antibody-antigen reactions requires the action of the enzyme which may be altered by the presence of other chemicals. The EMIT manufacturer has twice changed the enzyme employed because the same enzymes were excreted in urine by some humans (a source of false-positives) and recently because the enzyme gave a false-positive in the presence of certain anti-inflammatory drugs very commonly used.

8. Operator error is a significant problem as well. The issue of laboratory problems cannot be dismissed as trivial—indeed, they are gigantic. Laboratories are being flooded with samples and laboratories are springing up overnight to take advantage of this lucrative market

in which millions of samples must be tested. There is not only little evidence that good work is done, there is ample evidence that poor work is done. The Center for Disease Control has conducted a voluntary quality control program by mailing samples of urine in which known drugs were placed. Such laboratories did not perform particularly well when they knew they were dealing with CDC samples. When the samples were sent from the CDC in the guise of routine specimens and the laboratories were "blind," performance deteriorated to a level, not only unacceptable, but shameful. The error rate in laboratories ranged from 11-100%. Most errors were false-negatives, but false-positives were present at significant rates as well.

9. The gas chromatography/mass spectrometry method of urinalysis is much more reliable than the EMIT test but is not infallible. These tests are costly to run and require significant amounts of skill in the laboratory. Operator error and sample switching obviously render the GC/MS method less than 100% accurate.

I swear under penalty of perjury that the foregoing is true and correct.

16 Oct. 1986 /s/ John P. Morgan, M.D.
Date JOHN P. MORGAN, M.D.

[Dr. Morgan's *curriculum vitae* is omitted]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3522
Consolidated with 86-4058

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiffs,
v.
WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Defendant.

AFFIDAVIT OF DR. ARTHUR J. MCBAY

I, Dr. Arthur J. McBay hereby declare as follows:

1. My name is Arthur J. McBay. I am a toxicologist, with a Ph.D. in Pharmaceutical Chemistry from Purdue University. Currently I am the Chief Toxicologist of the Office of the Chief Medical Examiner, State of North Carolina. I am a professor of Pathology at the School of Medicine, the University of North Carolina. I am certified in Forensic Toxicology by the American Board of Forensic Toxicology and in Toxicological Chemistry by the American Board of Clinical Chemistry. My experience, education, and publications are set out in my *Curriculum Vitae*, attached hereto.

2. My area of expertise is forensic toxicology.

3. A major area of research which I am pursuing is the correlation between drug use and impairment of behavior. I have done consultation work and testified in 100 or more drug cases for prosecutors, plaintiffs and defendants. I have published 8-10 papers on this subject, and participated in numerous professional seminars regarding drug use and testing.

4. I am very familiar with urine testing procedures, including the Enzyme Multiplied Immunoassay technique (EMIT) test, marketed by the Syva Company. I have supervised thousands of EMIT tests. I recently completed a review of EMIT and other testing for the presence of marijuana in automobile drivers involved in 600 accidents.

5. The EMIT test is a homogeneous enzyme immunoassay test that responds to the presence of drug metabolites in urine. The test is available in a number of kits, each of which is designed to detect the presence of different classes of drugs, including amphetamines, barbiturates, cocaine, cannabinoids, opiates, and others.

6. In interpreting the results of an immunoassay, cut-off concentrations must be established. That is, the interpreter must establish at what level of concentration it will consider a test "positive." The lower the cut-off, the more tests that will be considered positive and *vice versa*. If the cut-off is set too low, the incidence of "false positives" increases, that is, a positive reading in the absence of the drug. Conversely, if the cut-off is set too high, the incidence of false negatives increases.

7. The EMIT screen suffers from limitations in its reliability. This test will give a positive result for the tested drug when other prescription and over the counter drugs have been ingested, and may react to food and other substances, including enzymes produced by the body itself. This is because of a phenomenon known as "cross-reactivity." The legitimate drugs that have triggered a positive result for marijuana for example, include the anti-inflammatory drugs ibuprofen, fenoprofen, and naproxen, some of the most widely used drugs in this country. They are sold under the brand names Advil, Motrin, Nuprin, Rufen, Anaprox, Aponaproxen, Naprosyn, Navonaprox and Nalfon. A number of drugs that are closely related in chemical structure to amphetamines will also test positive, mainly diet and cold preparations containing

ephedrine and phenylpropanolamine. These include Nyquil, Contac and other brand names. In addition, the immunoassay tests cannot distinguish between codeine, a legal drug, and heroin. Both are classified opiates.

8. I am also familiar with the Gas Chromatography/Mass Spectrometry method of urinalysis testing. If conducted properly, the combination of gas chromatography with mass spectrometry can provide a more reliable test for determining the presence of drugs in a urine sample, because it identifies the specific metabolites in urine samples. Positive identification however, requires strict handling safeguards and procedures which insure that the samples are not exposed to excessive temperatures through the transportation process. The GC/MS test is significantly more expensive to conduct. The concentration of drug detected through GC/MS will rarely agree with those reported by other methods, with the greatest divergence occurring with the immunoassay techniques.

9. All drug testing procedures result in false positives. The reliability of all drug determinations, whether by immunoassay or GC/MS, depend on such factors as the certainty of specimen identification; specimen storage, handling, and preparation; preparation and storage of test reagents; proper cleaning and calibration of testing instruments and hardware; and the qualification and training of laboratory personnel performing the test and interpreting the results. The danger of carelessness in test performance and/or inadequately trained personnel may be a particular problem with immunoassays, which are popular for low-cost, large-scale screening of many specimens with readily available equipment and minimum personnel training. The problem nonetheless is also present when GC/MS is utilized.

10. Although employers have placed great weight upon the results of urine testing, a true positive result may indicate, at most, that the person smoked or ingested a drug at some recent prior time. It is impossible, at

present, to establish by urinalysis testing that a person was adversely affected by the drug. There is no proven correlation between a positive test and observed or assessed human behavior. It is common in clinical studies to find high concentrations of marijuana metabolites in the urine of subjects when no THC induced subjective psychological effects are present. It is also impossible to tell exactly when a person ingested a drug, or in what dosage.

11. Among knowledgeable drug users, clean urine samples may be substituted for an individual's own urine, in order to produce a negative result. In addition, samples may be adulterated with a variety of contaminants (table salt, detergents, strong acid, or alkali) which will disrupt the chemical methodology and produce a negative result. Accordingly, the only way to avoid these substitution or adulteration problems that result in false negatives is to actually observe the urinary stream directly, from body to bottle.

12. Concentrations of drugs in urine are highest immediately after use, and they generally decrease to undetectable levels rapidly. Cocaine generally becomes undetectable after several days, as do amphetamines, opiates, and PCP. Although there have been cases where marijuana is detected for over 30 days, the metabolites of marijuana usually fall below an administrative cut-off value of 100 ng/ml for example, within an average of one day (range zero to three days) for light users (use once a week), and become undetectable at an average of three days (range zero to fourteen days) for heavier users (2-6 times per week). Even for the heaviest users (daily use or more often over a period of six months), marijuana becomes undetectable after an average of 5.3 days (range 0-22 days). All of this depends upon a number of factors, including the concentration of the urine, which in turn is determined by how much fluid a person takes in. A urine test could be changed from

positive to negative, or the reverse, simply by drinking more or less water. Given a few days or a week's notice that his or her urine will be tested, almost any individual who uses illegal drugs (except perhaps those with a serious drug problem, which would probably be detectable by observation) could avoid detection, simply by abstaining and increasing his or her fluid intake.

I swear under penalty of perjury that the foregoing is true and correct.

October 13, 1986 /s/ Arthur J. McBay
Date ARTHUR J. MCBAY, Ph.D.

[Dr. McBay's *curriculum vitae* is omitted]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3522
Consolidated with 86-4058

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiffs,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Defendant.

AFFIDAVIT OF DAVID J. GREENBLATT, M.D.

I, David J. Greenblatt, hereby declare as follows:

1. My name is David J. Greenblatt, M.D. I am a physician, Chief of the Division of Clinical Pharmacology at Tufts-New England Medical Center, and Professor of Psychiatry and Professor of Medicine at Tufts University School of Medicine. (My curriculum vitae is attached.)

2. My area of expertise is in the metabolism and effects of psychotropic drugs (that is, drugs which act on the central nervous system) in humans, including drugs of abuse. I am familiar with the various available methodologies for measuring and evaluating pharmacologic actions.

3. "EMIT" assay kits are commercially available units, represented by their manufacturer as allowing fast and easy detection of drugs of abuse in urine. "EMIT" stands for "enzyme multiplied immunoassay technique," which is the principle on which the test operates. EMIT assays are *indirect*, in that they depend on the reaction of the compound in question with an antibody, which in turn alters the activity of another enzyme. The concentration

of the drug itself is not measured, but, rather, its indirect effect on an enzyme. The EMIT test is *nonspecific* in that a "positive" result may be caused by other compounds, besides just the one in question, which react with the antibody or alter the activity of the enzyme.

4. *Specific* tests are available which directly measure the concentrations of drugs in body fluids. Such methods include: high-pressure liquid chromatography, gas chromatography, and mass spectroscopy.

5. In my opinion, the EMIT test for drugs of abuse in urine is an unreliable and inaccurate test. The reasons are as follows:

(a) The rate of false positives is unacceptably high. A "false positive" means a test that reads positive for a particular drug, when the drug is not actually present. False positives occur because the test is non-specific. For example, in a recent study from Northwestern University in Chicago, 25% of reported positive EMIT urine tests for cocaine were found to be false positives, in that the presence of cocaine or its metabolites were not confirmed by a specific analytic method. In fact, the manufacturer of the EMIT assay (Syva Corporation) clearly indicates that false positives can occur: false positive tests for amphetamines may happen from taking therapeutic cold medications such as Contac or Sudafed; false positive tests for opiates (such as morphine or heroin) may happen as a result of taking chloropromazine (Thorazine^{R}) —a medication used to treat schizophrenia—or from taking over-the-counter cough medicines containing dextromethorphan. It is also reported in the medical literature that amoxicillin—an antibiotic—can cause a false positive test for cocaine.

(b) The EMIT test also yields a high false negative rate, because the test is inherently non-sensitive. Approximately 50% of true positives will go undetected, depending upon the lower limits of detection the EMIT calibra-

tion are set at. Moreover, a subject can easily turn a positive into a negative, simply by drinking large amounts of water, thereby lowering the concentration below the limits of detection.

(c) The equipment and procedures necessary to perform EMIT assays properly, inadequate though the tests are at best, are sophisticated and should be done by persons with training and experience in analytical chemistry. When the tests are done by inexperienced or unsophisticated persons, the likelihood of inaccurate results becomes even higher.

6. For these reasons, EMIT assays for substances of abuse in urine are of little or no value and should *never* be used as presumptive or definitive evidence that a person has or has not taken a particular drug. If an assay method is used, definitive evidence should be based only on a *blood* test which is analyzed by a *specific* assay method.

7. My opinions in this regard are shared by pharmacologists, and other scientists and medical experts generally: the EMIT urinalysis test is not recognized as reliable.

8. I have examined the Customs Service Directive, establishing its drug screening program for applicants and employees selected for covered positions. In my opinion, the testing program will be essentially useless for determining whether employees use illegal drugs because of the likelihood of a high false negative rate and because most individuals who use illegal drugs can avoid a "true positive" result by abstaining from the use of drugs upon receiving short notice that they will be tested, and by increasing their fluid intake. With average water intake, an individual might produce approximately 1500 ml of urine per day (30 ml=1 ounce). A daily additional water ingestion of 1500 ml 6-7 8 ounce glasses) would approximately double the urine volume and reduce the concen-

tration of drug metabolites by 50%, just by simple dilution.

I swear under the penalty of perjury that the foregoing is true and correct.

8 October 1986 /s/ David J. Greenblatt, M.D.
Date DAVID J. GREENBLATT, M.D.

[Dr Greenblatt's *curriculum vitae* is omitted]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3522

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiffs

v.

WILLIAM VON RAAB, COMMISSIONER,
U.S. CUSTOMS SERVICE,
Defendant

AFFIDAVIT OF JANET WERNER

Janet Werner, being first duly sworn, deposes and says:

1. I am a Program Analyst, Office of Comptroller, U.S. Customs Service. From December, 1985, through August, 1986, I was the Drug Screening Coordinator and co-chairman of the Customs Drug Screening Task Force. This Task Force was responsible for the development and implementation of a drug testing program for the Customs Service.

2. The reason for initiating a drug screening program in the Customs Service relates directly to the Customs mission and responsibility for stopping the flow of illicit drugs into the United States. As a result of this mission, Customs employees, more than many other Federal workers, are by virtue of their assignments routinely exposed to criminal elements associated with drug smuggling, to actual illegal substances, and/or to confidential information related to drug enforcement. The drug screening program was established in recognition of the special responsibility of Customs and its employees to remain drug-free.

The drug screening program tests for use of illegal drugs covered by the program: marijuana (cannabinoids); cocaine; opiates; amphetamines; and, phencyclidine. Drug screening is not used to test for any other substances.

The drug screening program is limited to drug testing through urinalysis of any candidate tentatively selected for a position covered by the program. Positions have been identified for inclusion in the drug screening program if they meet one or more of the following criteria: direct involvement with drug interdiction and enforcement of related laws; a requirement that the incumbent carry firearms; or, a requirement for the incumbent to handle classified material.

Current incumbents of covered positions are not required to undergo drug screening. The positions come under the drug screening program only as they become vacant, at which point the tentative selectee is subject to drug screening. Any tentative selectee, whether a current Customs employee or not, would be subject to drug screening if tentatively selected for a covered position. Further, drug screening is not required when the appilcant is tentatively selected for reassignment to the same position as that which is currently held, such as in the case of a Customs Inspector being reassigned to another Customs Inspector position at the same grade in a different geographical location. Nor is drug screening required in the normal career progression of employees serving in "career ladders." For example, drug screening is not required when a Customs Inspector is promoted from a GS-7 to GS-9, a noncompetitive career ladder promotion. However, a competitive staffing action outside of the career ladder, such as promotion to a senior or supervisory position, would require drug screening as a condition of placement into the position.

Because drug screening is only triggered when a candidate applies for a covered position, and such action in-

volves a change in position, we consider the program to be an essentially voluntary one. If an employee or applicant does not wish to undergo drug screening, he/she need not apply for the position. In addition, a candidate may refuse to undergo drug screening at any point in the process, with the only consequence being loss of consideration for the position applied for.

3. The testing methodology recommended by the Task Force and adopted by the Customs Service is the enzyme-multiplied immunoassay test ("EMIT") with a required confirmation test using Gas Chromotography/Mass Spectrometry (GC/MS). This methodology was recommended after careful study and determined to be the best available technology in order to ensure reliable test results. The Task Force was composed of Customs personnel from various disciplines, including a chemist. Also, outside experts acted as consultants to the Task Force. Based upon review of a large amount of scientific literature and the opinions of experts, the EMIT test with a confirmation test by GC/MS was selected because these tests were determined to be state-of-the-art testing procedures.

4. Sample collection procedures by the contractor are, by Customs Drug Screening Program Directive, "close" but not "direct". That is, the contractor does not directly observe the voiding "body to bottle". The subject is permitted to void in privacy, in a closed stall or behind a closed door. (Males may elect to use a urinal or a closed stall.)

Instructions for sample collection provide that precautions will be taken to prevent sample adulteration. For example, blueing is placed in the toilet water to prevent the subject from diluting the sample. In addition, sources of water are turned off, and female subjects are not allowed to bring purses into a stall.

Attached are two memoranda from the laboratory (PharmChem) and its subcontractor for collection (Equi-

fax), which specify that close rather than direct observation is the method utilized by Customs.

5. There are three basic forms associated with the Drug Screening Program. Copies of these forms are attached.

(1) The Report of Tentative Selection serves to identify an individual who has been selected for a position requiring drug screening. The Report of Tentative Selection is filled out by the personnelist concurrently with a letter of tentative selection. The letter of tentative selection serves as a tentative offer of employment. The offer is considered tentative because a firm offer is contingent upon the candidate's successful completion of any number of pre-employment conditions, including drug screening. Other pre-employment requirements may include a background investigation, medical examination, an employment agreement, etc. Any and all of these requirements, including drug screening, may apply, depending upon the position being filled.

(2) A pre-test form is filled out at the time of sample collection, and is used to document medications, poppy seed ingestion, and legitimate contact with illegal substances. The pre-test form is used to ensure that a subject understands the ramifications of the drug screening test.

(3) The chain of custody form is a dual purpose form, used both to ensure that the sample is not mixed-up or tampered with, and is also used to report the results of the drug screening test to the Drug Screening Coordinator.

When the Drug Screening Coordinator receives the Report of Tentative Selection from the appropriate staff member in Personnel, data from the report is input into a computer system. This data creates a drug screening record and a corresponding control number. A vendor contact date is assigned at the time the record is created.

In accordance with the Memorandum of Understanding with N.T.E.U. on drug screening, the vendor is not contacted by the Drug Screening Coordinator until at least 5 calendar days have elapsed. The vendor is contacted by the Drug Screening Coordinator and is asked to contact the subject to arrange for drug screening.

When the subject undergoes drug screening, the pre-test form is filled out. The pre-test form is a three-part form. One copy is maintained by the subject, another retained by the Drug Screening collection office, and the third sent in a sealed envelope to the Drug Screening Coordinator. The social security number of the subject is written on the outside of the sealed envelope. Upon receipt of negative test results from the laboratory, the unopened envelope is shredded by the Drug Screening Coordinator or the Drug Screening Assistant.

Upon completion of the sample collection, the Chain of Custody form, signed by both the collector and the subject, is sent to the laboratory, along with the sample. After the urine sample has been analyzed, this form is completed by laboratory personnel and mailed to the Drug Screening Coordinator. The laboratory assigns each sample control numbers to track the sample as it moves through the screening, and if needed, the confirmation test process. The Chain of Custody form is a four-part form. The original copy is returned, with the results of the test noted on the form to the Drug Screening Coordinator. The second copy is retained by the laboratory. The third copy, with all information identifying a particular subject removed, is used for billing purposes, and the fourth copy is retained by the collector.

6. When the Chain of Custody form is received by the Drug Screening Coordinator with negative test results, a notification letter is prepared. The notification letter is given to the appropriate personnelist in the Office of Human Resources responsible for hiring the subject. The letter is filed in the subject's Official Personnel Folder

upon completion of the staffing process. A second copy of the notification letter is given to the Office of Internal Affairs, Office of Personnel Security, to be filed with the background investigation report.

In the event of a positive test result, the pre-test form is removed from the sealed envelope and examined. The laboratory sends supporting technical reports to document the positive finding. All documentation relating to the positive finding are sanitized by the Drug Screening Coordinator and then submitted to the Office of Commercial Operations, Technical Services Division. The Technical Services Division completes a technical review of the laboratory report and supporting documentation and then reports its findings in writing to the Drug Screening Coordinator. If further action is needed (i.e., if the subject has used illegal substances), the appropriate office is notified by the Drug Screening Coordinator for initiation of follow-up action in accordance with applicable Customs policies.

A copy of the report of tentative selection and the chain of custody is maintained by the Drug Screening Coordinator. Access to these files is restricted to the Coordinator and Assistant. Access to the automated system for the drug screening program is limited to the Drug Screening Coordinator, Drug Screening Assistant, one alternate, and the computer Systems Administrator (who has access to all of the automated systems on the computer).

Drug testing records are included in the Privacy Act systems of records for applicant records designated as OPM/GOVT-5 and OPM/GOVT-10.

Attachments:

Report of Tentative Selection
Drug Screening Pre-Test Form
Chain of Custody Form
Pharmchem memorandum of May 14, 1986
Equifax memorandum of August 19, 1986

/s/ Janet L. Werner
JANET L. WERNER

Sworn to and subscribed before me this 3rd day of November 1986.

/s/ Carolyn S. Halter
Notary Public

My Commission expires
November 14, 1987

REPORT OF TENTATIVE SELECTION

FOR INTERNAL USE ONLY

If selectee requires drug screening and/or background investigation, complete all items, detach and distribute per listing below.

Name: _____

Home
Address: _____

SSN _____

Home Telephone _____

Work Telephone _____
(not FTS)

Date of Letter _____
(Be sure to provide zip code)

Check one: — Customs Applicant

Current Position Title, Series, Grade

— non-Customs

Position Title: _____

Series and Grade: _____

Region: _____

Duty Station: _____

Organizational Component: _____

Check items which apply to position/candidate:

— Drug Screening Test

— Background Investigation

Distribution—Check recipient:

— Drug Screening Coordinator (if applicable), Room 1142

— Background Investigation Coordinator, Room 1142

_____

Staffing Specialist

_____

Division/Branch

_____

Telephone Room#

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
Washington, D.C. 20229

PER-12-CM:H

_____

_____

_____

_____

Dear _____:

We are pleased to advise you that you have been tentatively selected for employment with the U.S. Customs Service, _____ Region, as follows:

Position Title: _____

Salary: _____

Series and Grade: _____

Organizational Component: _____

Duty Station: _____

At this time, your selection is to be considered as *tentative* since a firm offer of employment is contingent upon your meeting the applicable requirements designated below:

DRUG SCREENING TEST

— Continued consideration for this position is contingent upon satisfactory completion of a drug screening test. Drug screening will be performed through laboratory analysis of a sample of your urine. Since satisfactory completion of drug screening is a condition of employment/placement, candidates with positive findings indicating the use of illegal drugs are subject to loss of consideration for this position.

We will be providing your home and work telephone numbers to our drug screening collection agent so that they may contact you to arrange for your drug screening test. If the home and work telephone numbers provided by you on your SF-171 are not current, please advise this office immediately.

Candidates who do not wish to undergo drug screening will receive no further consideration for the position. Please let us know as soon as possible if you do not wish to undergo drug screening.

A Drug Screening Fact Sheet is enclosed to provide you with complete information about the process. Please be sure to read the fact sheet, as it contains important facts about the drug screening process and information you should have with you at the time of sample collection.

BACKGROUND INVESTIGATION

— Not applicable.

— A favorably completed background investigation is required prior to your placement in the position you have applied for.

— The type or recency of your last background investigation does not meet the requirements for the position you have applied for; thus, successful completion of an updated background investigation is required.

Enclosed are the instructions and the forms you will need to complete for the mandatory background investigation. These forms are to be returned, typed and properly completed, in accordance with the instructions to the address listed below, *no more than three days after your receipt of this letter.* Do not wait for any part of the drug screening process (if applicable) to occur prior to completing and transmitting these background investigation forms.

Background investigation forms should be mailed to:

U.S. Customs Service
P.O. Box 486
Franklin Station
Washington, D.C. 20044

PHYSICAL REQUIREMENTS

— You are required to obtain a physical examination before you can be assigned to this position. Please take the enclosed form SF-78, Certificate of Medical Examination, with the attachment to your doctor and undergo an examination at your own expense for the items indicated. Sign the SF-78 in the presence of your doctor and be sure to tell your doctor to sign in Part C and to circle the appropriate handicap code number in Part F. (Make sure that your signature and your doctor's signature go through the carbon paper to the second page of the SF-78.) Have your doctor mail the SF-78 in the enclosed self-addressed envelope provided for this purpose.

SELECTIVE SERVICE REQUIREMENTS

— Male applicants between the ages of 18 and 25 are eligible for appointment only after registering for the Military Draft. A self-certification form is enclosed to verify your registration status. Applicants who have not registered as of their 26th birthday, or who refuse to do so, may not be appointed without a determination from the Office of Personnel Management.

TRAINING

— Assignment to this position will require that you spend —— weeks at the Federal Law Enforcement Training Center (Glynco, Georgia) or, for Canine Enforcement Officer positions, the Canine Enforcement Training Center (Front Royal, Virginia) in a formalized course of required basic technical training which must be successfully

completed according to the standards of the U.S. Customs Service. Failure to successfully complete the required course of basic training in accordance with the standards and policies of the U.S. Customs Service will be grounds for mandatory removal from this position: such failure will result in either assignment to a different position, demotion, or separation from the Service by appropriate procedures. Please sign and date the enclosed "Employment Agreement", which indicates your understanding and agreement to these conditions. A self-addressed envelope has been provided for the return of the Employment Agreement.

RELOCATION

— You are eligible for relocation expenses. Please read and complete the information in the enclosed relocation package and forward to your gaining office for approval. Travel and transportation and other relocation allowances are in the interest of the government and are authorized as provided by Section 5330, Policy and Procedures Manual, "Travel and Transportation". Refund of travel and transportation expenses will be required if you leave the Federal Government within 12 months of the date of this action, except under unusual circumstances.

YOU ARE REMINDED that you have only been tentatively selected at this time and that a final offer of employment is contingent upon the satisfactory completion of all necessary pre-employment items as well as a final overall review of your qualifications. Therefore, you are cautioned not to give notice at your place of current employment or to make arrangements to sell your home or relocate your residence until you receive further information from us.

Congratulations on having reached this stage of the selection process. If you have any questions, please feel free to contact me at _____.

Sincerely,

Personnel Staffing Specialist
Office of Human Resources

Enclosures

NOTE: If you are no longer interested in this position, please notify this office immediately.

DRUG SCREENING PRE-TEST FORM
U.S. CUSTOMS SERVICE

Name (Print) _____

Social Security Number _____

1. Have you taken any medications in the last thirty days? (You do not need to list any commonly used over-the-counter medications such as aspirin or cold preparation). List types of medications and dates taken: _____
_____
_____

2. Have you been in direct contact with controlled substances (illegal drugs) in the performance of official duties during the past thirty days?

No ——

Yes —— Please explain the circumstances under which direct contact was made, and the date(s) of such contact(s). _____
_____
_____

3. My signature below indicates that I understand the following: (1) satisfactory completion of drug screening is a condition of employment/placement in the position applied for; (2) if the results of this test indicate use of illegal drugs, I am subject to loss of consideration for the position applied for; (3) if I am currently a Customs Service employee and the results of this test indicate use of illegal drugs, I am subject to removal from the U.S. Customs Service; and, (4) if I refuse to undergo drug screening I will lose consideration for the position applied for.

_____ ____ _____ ____
signature of subject date signature of witness date

Privacy Act Statement: Section 7301 of Title 5 the U.S. Code authorizes collection of this information. Executive Order 9397 authorizes the collection of social security numbers. The disclosure of this information is voluntary. The primary uses of this information are to determine whether medications taken and/or legitimate contact with illegal drugs by an individual may have affected positive urinalysis drug testing results, and to assist the agency in making employment/retention decisions. This information will be disclosed to the Customs Drug Screening Coordinator and other appropriate managers only when positive test results are obtained. Failure to provide this information may prevent the agency from considering the effect of medications taken by an individual on a positive test result.

Distribution: White—U.S. Customs Service
Yellow—Collector
Pink—Subject

DRUG SCREENING PRE-TEST FORM ADDENDUM
U.S. CUSTOMS SERVICE

In the event that you have eaten foods containing poppy seeds, please complete this form prior to undergoing your drug screening test.

The consumption of foods containing small amounts of poppy seeds (i.e. poppy seeds on a bagel) normally will not affect drug screening test results. However, it has been found that consumption of foods rich in poppy seeds may effect the drug screening results of some individuals. So that we can consider all factors when evaluating your results, please complete the information below regarding poppy seed ingestion.

Within the past 48 hours, have you eaten foods containing poppy seeds (i.e., poppy seed cake, poppy seed salad dressing, danish, sweet rolls or buns containing poppy seeds, etc.)? If yes, please list below.

Food Consumed	Date of Consumption	Amount of Consumption
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Even if you have eaten poppy seeds, your test results may not be positive. Therefore, at this time, we ask that you undergo drug screening. However, in the event that the results of this test are positive due to poppy seed ingestion, we will be contacting you to ask that you undergo drug screening a second time.

CHAIN OF CUSTODY FORM.

EXHIBIT F

EQUIFAX SERVICES
Physical Measurements Information

CHAIN OF CUSTODY FOR DRUG AND ALCOHOL ANALYSIS

Confidential

Specimen Sent to:
PharmChem Laboratories, Inc.

③ **DRUG ANALYSIS**

① Results to
Customer Name and Address
Attn: Medical Director

Phone # ( )

② Result Code #
⑦ ☐☐☐☐☐☐

Results by
- ZAP
- FAX
- Mail

- PANEL I
- PANEL II

a) Pre-employment
b) Periodic
c) For Cause/Accident Invst
d) Back to Work/Fitness for Duty
e) Random

THIS IS A DRAFT FORM - PLEASE PRESS FIRMLY.

DOCTOR/PMI TO COMPLETE SECTION BELOW

④ Applicant/Employee Name _____ ⑤ SS # ☐☐☐-☐☐-☐☐☐☐

⑥ Age _____ ⑦ Sex ☐ Male ☐ Female ⑧ Job Title _____

⑨ Date Collected _____ ⑩ Time Collected _____ ⑪ Date Shipped _____

⑫ Collected By _____ Purolator ☐ Mail ☐ Other _____ ⑬ Title _____

⑭ Doctor/PMI COMMENTS: (medications, vitamins used in the past 30 days, dosage)
(urine color, temp., etc.)

_____

_____

I APPLICANT'S/EMPLOYEE'S CERTIFICATION. I hereby acknowledge that the urine and/or blood specimens accompanying this form are my own. Further, I attest that the specimen(s) were sealed in my presence and initialed by me in the manner indicated below prior to forwarding for laboratory analysis.

⑮ Applicant/Employee Signature _____

PMI Address Stamp

WITNESS STATEMENT:

The tamper proof custody seal was initialed by the donor, and the specimen sealed in my presence.

⑯ _____
PMI Doctor/Technician (Witness)

INSTRUCTIONS:
Doctor or PMI to label bottle/tube and place it along with all 3 copies of the completed form in mailing container.

PHARMCHEM LAB TO COMPLETE SECTION BELOW.

⑰ Specimen Received By _____ ⑱ Date Received _____ ⑲ Time Received _____

⑳ Urine specimen seal intact? Yes _____ No _____ ㉑ Tray No _____

㉒ Blood specimen seal intact? Yes _____ No _____ ㉓ Lab No _____

㉔ Specimen received in good condition? Yes _____ No _____

㉕ LABORATORY TEST RESULTS: INCOMPLETE (send another specimen) ☐ NEGATIVE ☐
CONFIRMED POSITIVE ☐ DRUGS: _____

㉖ Analysis Supervisor: _____

㉗ Lab Results Reported: Date _____ By _____ /ZAP ☐ FAX ☐ MAIL ☐

㉘ Comments _____

Laboratory to distribute as follows: (1) WHITE - Original - Customer (2) YELLOW - Lab - Billing (3) PINK - Lab file only (4) BLUE - Retained by PMI Location

CONFIDENTIAL

PHARMCHEM LABORATORIES, INC.
3925 Bohannon Drive
Menlo Park, California 94025
(415) 328-6200

May 14, 1986

Ms. Judith M. Nalley
Product Manager
EQUIFAX Services
1600 Peachtree Street, NW
P.O. Box 4081
Atlanta, GA 30302

Dear Judy:

As you know, PharmChem and Equifax Services—PMI have submitted a proposal to U.S. Customs Service in response to RFP.CS-86-041 to provide urine sample collection and laboratory analysis services.

Mr. James Lieberman, from the U.S. Customs, contacted PharmChem and asked that we accept a service order to perform collection and analysis services in a manner similar to that described in our joint proposal. This request is not related to the eventual awarding of the contract but is instead a one-time order for a limited number of tests.

Following your acceptance of this project contingent upon receiving assurance that U.S. Customs currently has an active drug policy, I telephoned Mr. Lieberman and was verbaly informed that U.S. Customs has a drug policy in place and that their employees are aware of this policy.

This service order would require collection and laboratory analysis of urines from their Senior Executive Services personnel. About 35 specimens would be collected from the Customs office, Washington, D.C. and two each from seven regional offices.

We are to perform according to the attached Statement of Work and Order No. CS-86-49485-3. This specification

is similar to our proposal but varies in several areas. The primary variation is that close, as opposed to direct, observation of specimen is required. This involves the stationing of PMI personnel outside the door of the restroom facility during specimen collection. I also learned today that EQUIFAX and Customs attorneys are developing a label that must be attached to the chain-of-custody document notifying those handling the document of privacy act requirements.

In the absence of a formal contract which would contain otherwise necessary language, PharmChem Laboratories, Inc. is willing to undertake this project with the following understanding. PharmChem will perform to the best of its ability. In the event of a disputed result, PharmChem's liability will be limited to performing a re-analysis of the specimen at no expense to U.S. Customs.

Sincerely,

/s/ John McLenegan
JOHN MCLENEGAN
Vice President/Operations

JM/pm
enc.

cc: Mr. James Lieberman

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

BLANKET PURCHASE ARRANGEMENT

$220, P&PM

The Pharmchem Laboratories Company agrees to furnish the following supplies and/or services _____ as requested by the contracting officer or his authorized representative during the period From: 4/30/86 Through: 9/30/86 unless extended by mutual agreement of the parties hereto.

The Government is obligated only to the extent of authorized calls actually placed against the blanket purchase arrangement.

The vendor warrants that the prices quoted at the time(s) the order(s) is placed are as low as or lower than the prices quoted to, or paid by, any purchaser for like quantities of the items required to be delivered hereunder under like circumstances and shall be the price(s) shown on billing.

No individual call under this arrangement shall exceed $5,000.

The following listed individual(s) _____ shall be the only individual(s) authorized to place calls under this BPA, in the name of U.S.C.S. . No others shall be accepted.

NAME: Janet Werner TITLE: Office of Human Resources

NAME: Deborah Spero TITLE: Office of Human Resources

NAME: Bob Smith TITLE: Office of Human Resources

Since all orders under this arrangement are placed by telephone and at that time information as to availability of stock for delivery and price information is established, there shall be no partial deliveries. Partial deliveries are NOT desired; SHIP COMPLETE ONLY.

Delivery/Service Tickets - all shipments under the arrangement shall contain the following information:

(a) Name of supplier
(b) Blanket purchase arrangement number
(c) Date of call
(d) Call Number
(e) Itemized list of supplies/services furnished; and
(f) Quantity

Only one (1) copy of delivery/services ticket is required.

Your invoice itemizing the supplies or services furnished including unit price, extensions and total amount due, BPA order number and call numbers shall be submitted monthly covering all deliveries made during the billing period for which payment has not been received. Discounts for prompt payment will be in accordance withh paragraph (3) of the attached terms and conditions, (SF 147).

Person(s) and/or department to be contacted when placing orders under this arrangement:
John McLenegan (415) 328-6200
NAME TELEPHONE NO. and EXTENSION

Discount for prompt payment: _____

The issuance of individual requests against this blanket purchase arrangement will be made under the authority of Title 41, USC 252(c)(3).

Terms and conditions attached hereto are made a part hereof (include applicable clauses).

ACCEPTED John McLenegan

BPA Number CS-86-49485-3

Company Name: Pharmchem Laboratories, Inc.

Signature & Title Date: 5/11/86

Contracting Officer: Stanley H. Livingstone

Signature Date: 4/30/86

Please acknowledge and return Copies 2 and 3 to the USCS contracting officer.

BEST AVAILABLE COPY

*U.S. GOVERNMENT PRINTING OFFICE: 1984—718-071/125

Customs Form 295 (052482)

COPY 2 PROCUREMENT

EQUIFAX MEMORANDUM

To PMI Location Supervisors

From Judy Nalley, Product Manager—Drug Abuse Management Service

Subject SERVICE—U.S. CUSTOMS, ACCOUNT #457-744

Date 08/19/86

Copy To Zone VP—Operating
Regional VP—Operating
Managers with PMI Responsibility
PMI Zone/Area Managers
Frank Robinson, VP Sales
Dave Hinnes, ASVP Newark
Gary Zentgraf Baltimore
JXH, CMB—LHMC

PharmChem/Equifax has been awarded the contract for Drug Abuse Management Services effective August 18, 1986.

This is a national account with a potential for 14,000 urine collections the first year. Geographical locations where initial service will begin:

* Los Angeles
* San Diego
* Seattle
* San Antonio (Laredo)
* Phoenix (Nagolis)
* New York
* Washington, DC
* Tucson
* Miami

* There will be approximately 10-40 cases called into these locations within the next several weeks.

Large numbers of applicants/employees will be screened in Miami and on the Mexican border.

There are a number of issues that U.S. Customs has asked that we communicate to our field offices:

1. The U.S. Customs Service is a federal government agency, *not* an insurance company.
2. The program for this customer is pre-employment. However, U.S. Customs Service employees who apply for certain other positions with U.S. Customs will be tested as part of this program.
3. Observation is *never* direct for this customer. Please follow instructions in Form 20557, *Drug Screening Manual*, for private and public rest room situations. (If desired, males should have the option of using a stall rather than a urinal.)
4. A small supply of three-part U.S. Customs Pre-Test forms is being sent with this package. Additional Pre-Test forms *must* be ordered from PharmChem.

   Instructions on completion and distribution of the Pre-Test form are outlined on the enclosed requirements chart.
5. The only approved service for U.S. Customs is Drug Abuse Management Services. *No pre-employment Occupational Health Screening* is to be done on this account.
6. If possible, the applicant/employee should come into the PMI location for service.

   If the applicant/employee cannot be scheduled with PMI during normal working hours, contact Janet Werner at U.S. Customs, (202) 566-8228.

   If the applicant/employee cannot come into the PMI location, contact Janet Werner for assistance with scheduling.

   The U.S. Customs Service has offices in over 350 cities nationwide, and can use those offices for alternate collection sites. In these instances Janet Werner will provide PMI locations with the name and telephone

number of a U.S. Customs official located at the alternate site. PMI should travel to this location to complete service.

Time and expenses can be charged if PMI travels beyond a 20-mile radius from the PMI office.

Instructions on completion of the Form 61 appear on the enclosed requirements chart.

7. U.S. Customs has an active labor union. The U.S. Customs Service management has reached an agreement with the labor union on drug testing. In the unlikely event that a union official reports with a subject to a PMI office, or alternate site, please contact Janet Werner, Drug Screening Coordinator.

The revised requirements chart is included in this package. Key points to remember on this service are:

- No direct observation.
- Completion and distribution of U.S. Customs Pre-Test Form.
- Follow *all* urine drug collection procedures outlined in the *Drug Screening Manual*, Form 20557. This is CRITICAL.
- Any questions regarding scheduling, contact Janet Werner, Drug Screening Coordinator at (202) 566-8228.

Please maintain this file for reference. The requirements chart will also be included in the requirements chart revisions in the future.

Thank you.

JMN:dap

SERVICE:

Pre-Employment
Urine Drug Collection—Panel I
NO DIRECT OBSERVATION

FORMS:

Chain of Custody Form—See Note*
Pre-Test form (order direct from PharmChem)

BILLING INSTRUCTIONS:

PMI-288 Commercial inquiry

- Check block # 13 or # 20, write in P-1
- Do NOT enter any expense
- Always affix SS # of the employee above the Last name information.
- Mileage cannot be charged if less than 20 miles one way. If mileage in excess of 20 miles, attach Form 61 showing time & mileage to inquiry (Attach receipts if motel/lodging to be charged).

CHAIN OF CUSTODY FORM

* NOTE:

- Do Not show any medications on the chain of Custody Form. Medications are shown on the U.S. Customs Pre-test form *ONLY*.
- Next to # 14 write in the wording "Medications are documented on Pre-test Form".

U.S. Customs Pre-Test Form—(See Sample on reverse side)

- PMI completes on *ALL* applicants/employees.

1. Document medications, if no medications being taken, write in "None".

2. Check appropriate block. If yes, describe in detail.
3. Signature of Applicant/employee *and* date. Signature of Witness *and* date.

- See distribution instructions—bottom left corner of form.
- Attach any medication forms or documents to original (white) copy of pre-test form.
- Place original (white) copy of pre-test form in plain envelope, show applicant/employee's SS # on the outside of the envelope.
- Mail this envelope to:

Confidential: U.S. Customs Service
Drug Screening Coordinator, Room 1136
1301 Constitution Ave. N.W.
Washington, D.C. 20229

URINE COLLECTION PROCEDURES

When the appointment is scheduled with the Applicant/employee always:

- Advise that a urine specimen will be collected.
- Ask them to bring the names and dosages of all medications and drugs taken within past 30 days.
- Advise that a photo I.D. will be requested.
- Follow all Chain of Custody procedures as outlined in the Drug Screening Manual (Form 20557).
- Make sure that cap is tightened securely on urine specimen bottle.

FORWARD URINE SPECIMEN TO:

PharmChem Laboratory, Inc.
3925 Bohannon Drive
Menlo Park, CA. 94025-1094

by

Purolator Overnight Mail

(PMI: DO NOT OVERSTUFF ENVELOPES!!)

CUSTOMER: RESULT CODE #: 21190A

RESULTS BY: First Class Mail

Confidential: U.S. Customs Service
Drug Screening Coordinator, Room 1136
1301 Constitution Ave. N.W.
Washington, DC. 20229

CONTACT: Janet Werner, Drug Screening Coordinator #202-566-8228 *ALWAYS*:

- IF applicant/employee:

1. Is a "No Show" or contact cannot be made in *3* working days.
2. Cannot be scheduled in PMI Office during normal working hours.
3. Brings a union official with him/her to the appointment for PMI service.

U.S. CUSTOMS SERVICE—PRE-TEST FORM

(Sample)

DISTRIBUTION

White Copy—U.S. Customs Service

Place in white envelope with S.S. # on outside. Send to:

Confidential: U.S. Customs Service
Drug Screening Coordinator Room 1136
1301 Constitution Ave. N.W.
Washington, DC. 20229

Yellow Copy—Collector

PMI retains with (blue) copy of the Chain of Custody Form in file.

Pink Copy—Subject

Given to applicant/employee when PMI service is performed.

DRUG SCREENING PRE-TEST FORM
U.S. CUSTOMS SERVICE

Name (Print) John R. Doe

Social Security Number 251-88-2131

1. Have you taken any medications in the last thirty days? (You do not need to list any commonly used over-the-counter medications such as aspirin or cold preparations). List types of medications and dates taken: —— none

---

2. Have you been in direct contact with controlled substances (illegal drugs) in the performance of official duties during the past thirty days?

No X

Yes —— Please explain the circumstances under which direct contact was made, and the date(s) of such contact(s). ——————————————————

——————————————————

——————————————————

3. My signature below indicates that I understand the following: (1) satisfactory completion of drug screening is a condition of employment/placement in the position applied for; (2) if the results of this test indicate use of illegal drugs, I am subject to loss of consideration for the position applied for; (3) if I am currently a Customs Service employee and the results of this test indicate use of illegal drugs, I am subject to removal from the U.S. Customs Service; and, (4) if I refuse to undergo drug screening I will lose consideration for the position applied for.

John R. Doe	8-19-86	Illegible	Aug. 19, 1986
signature of subject	date	signature of witness	date

Privacy Act Statement: Section 7301 of Title 5 the U.S. Code authorizes collection of this information. Executive Order 9397 authorizes the collection of social security numbers. The disclosure of this information is voluntary. The primary uses of this information are to determine whether medications taken and/or legitimate contact with illegal drugs by an individual may have affected positive urinalysis drug testing results, and to assist the agency in making employment/retention decisions. This information will be disclosed to the Customs Drug Screening Coordinator and other appropriate managers only when positive test results are obtained. Failure to provide this information may prevent the agency from considering the effect of medications taken by an individual on a positive test result.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3522

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiff,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Defendant.

DECLARATION UNDER PENALTY OF PERJURY

I, Commander Walter F. Vogl, hereby declare as follows:

1. I am a chemist, with a Doctor of Philosophy degree in Chemical Engineering from the University of Virginia. Currently, I am a Senior Policy Analyst for Drug and Alcohol Abuse Prevention in the Office of the Assistant Secretary of Defense for Health Affairs. In this position, I am responsible for establishing the policies for the Department of Defense drug testing program. Formerly, I was Officer-in-Charge of the DoD Drug Detection Quality Control Laboratory located at the Armed Forces Institute of Pathology. In that position I was responsible for conducting the proficiency testing program that evaluated the performance of the drug testing laboratories. A Curriculum Vitae is attached hereto.

2. I am familiar with both the Enzyme Multiplied Immunoassay Technique (EMIT) and gas chromatography/mass spectrometry (GC/MS).

3. The EMIT test is a homogeneous enzyme immunoassay that uses an antibody to detect the presence of a drug or metabolite in urine. For each assay, drug present in urine competes with enzyme-labeled drug for binding sites on an antibody. The drug present in the urine sample displaces enzyme-labeled drug from the binding sites and causes more enzyme to remain active. The change in enzyme activity is a function of the amount of drug or metabolite present in the urine sample. There is a different test kit for various drugs (amphetamines, barbiturates, cocaine, opiates, cannabinoid, PCP).

4. The GC/MS procedure utilizes both the physical and chemical properties of the drug or metabolite to be identified. The first part of the procedure involves separating the drug or metabolite from the urine matrix by using an extraction procedure that is generally followed by a chemical derivatization step. The derivatized drug or metabolite is then separated from all other substances by using a gas chromatograph equipped with a mass spectrometer. The mass spectrometer compares the fragmentation pattern of the extracted drug or metabolite to a known standard. This procedure is recognized as the state-of-the-art method and when operated properly is scientifically sufficient for making a positive identification of a drug or metabolite. If the GC/MS procedure results in a positive identification of a drug or metabolite in a specimen, it is absolutely accurate.

5. The use of external proficiency testing programs ensure that the performance of drug testing laboratories meet certain requirements. The blind sample program conducted by the DoD Drug Detection Quality Control Laboratory at the Armed Forces Institute of Pathology is an example of such a program. It involves sending sets of urine samples (36/set) to various submitting activities (military installations) on a weekly basis. The urine samples are coded, included with personnel specimens, and sent to the various drug testing laboratories. The submitting activities return the lists of assigned sample numbers of AFIP which allows cross-referencing the blind proficiency samples. Each drug testing laboratory sends information copies of all its results to AFIP.

These results are then compared to the actual blind sample results. The emphasis of the blind sample program is detecting false positives and administrative errors. There has not been a single false positive result reported by the drug testing laboratories on the negative blind samples in the past several years. A blind sample program is an effective method for ensuring high quality and identifying problems, if any, in drug testing programs.

6. With regards to the performance of the GC/MS. To my knowledge each laboratory has been able to reconfirm the presence of a drug or metabolite in specimens reported positive when retests are requested. The ability to reconfirm the presence of a drug or metabolite in a specimen that has been frozen for several months provides evidence that GC/MS is an extremely reliable analytical technique and that laboratories are using very stringent intra-laboratory chain of custody procedures to prevent specimens from being switched.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at the Pentagon, Arlington, Virginia on October 31, 1986.

/s/ Walter F. Vogl
WALTER F. VOGL

[Commander Vogl's *curriculum vitae* is omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3522

NATIONAL TREASURY EMPLOYEES UNION,
Plaintiff,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Defendant.

DECLARATION UNDER PENALTY OF PERJURY

I, William von Raab, Commissioner of the United States Customs Service, hereby declare the following:

Introduction

1. My name is William von Raab, and I am the Commissioner of the United States Customs Service. I firmly believe that drug screening of candidates for certain designated sensitive Customs positions is essential to ensure that Customs effectively carries out its mission to interdict the flow of illegal narcotics into the country. This affidavit sets out why drug screening is such a key part of the Customs hiring process, and how this Court's order forbidding such drug screening for applicants to sensitive positions has placed the Service in an untenable position. In summary, these reasons are:

(a) For years, the Custom Service's number one priority has been to interdict illegal narcotics entering this country. The importance of this mission has recently been underscored by the President of the United States who has made dealing with the national drug problem

a top domestic priority, and secondly, by the Congress of the United States, which has provided unprecedented additional resources to Customs for improving narcotics interdiction.

(b) It is clearly illogical to expect "drug users" to conscientiously and effectively carry out Customs narcotics interdiction responsibilities. Obviously, attitude and commitment are critical to the difficult law enforcement task that the Service faces. Simply put, how can those who have been using drugs commit themselves to interdicting drugs?

(c) Those who have used drugs will not carry out our agency's mission, their judgment may be impaired in situations requiring split-second thought and action, and they are much more likely to become involved in complicity with drug smugglers leading to a corresponding ease of smuggling through the Customs Service. In essence, hiring drug users directly undermines the effectiveness and integrity of the Customs Service.

(d) In order to improve its interdiction of narcotics, Customs has begun one of the most extensive recruitment drives in its history to hire key personnel including inspectors, investigators, special agents, and other drug enforcement officers who will be directly involved in Customs narcotics interdiction mission. The current enforcement-related vacancies combined with new positions recently provided by Congress, added with anticipated turnover, will require Customs to recruit approximately 3,000 new employees and this out of a workforce that currently is less than 14,000 permanent employees. Consequently, the decision to suspend drug screening could not have come at a worse time for the Customs Service.

(e) The decision requiring Customs to suspend drug testing puts the Customs Service in a irreconcilable dilemma. We are faced with the choice of either suspending recruitment and thereby being unable to implement

the greatly enhanced interdiction efforts mandated by the President and the Congress, or of continuing with recruitment without the benefit of drug screening, thereby risking hiring the very type of person, i.e., a drug user, lacking the integrity to play a key role in the fight against narcotics smuggling. We do not believe it is in the interest of Customs or the nation to have to face such a dilemma.

The Customs Service and its Mission

2. The Customs Service, as the nation's primary border enforcement agency, is charged with the responsibility for interdicting illegal drugs that enter the country. Through our focus upon the interdiction of drug traffickers and smugglers, the Customs Service plays a leading role in the enforcement of our nation's drug laws. Our objectives are to use all available personnel and the most sophisticated, technical detection methods available to facilitate high speed passenger and cargo processing while achieving maximum interdiction of drug traffickers and smugglers.

3. In connection with the agency's mission to enforce our nation's drug laws, the majority of Customs workers has direct responsibility and involvement with the interdiction of illegal narcotics. Customs employees are routinely exposed to actual illegal substances and confidential information relating to drug enforcement. As the smuggling of illegal drugs has increasingly involved violence and bloodshed, many Customs employees are required to carry and use firearms in connection with their official duties. This danger is an unfortunate, though necessary part of work as Customs Agent, Investigator and Inspector, all of which involve the investigation, apprehension and detention of persons suspected of smuggling drugs. Drug smugglers do not hesitate to use violence to avoid apprehension and thus continue their extremely lucrative criminal enterprise. Customs Officers

have been shot, stabbed, run over, dragged by automobiles, and assaulted with blunt objects while performing their duties. During 1986 alone, Customs Officers were the victims of assault on 32 occasions, and were shot at on 15 different occasions. Since 1974, nine officers have died in the line of duty.

4. Customs workers are often privy to confidential information regarding drug smuggling interdiction efforts; such information, if passed along to criminal drug smuggling enterprises, could fatally compromise massive and expensive government interdiction efforts and endanger the lives of Customs employees.

5. In recent years, the use of illegal drugs by Americans has reached near epidemic proportions, threatening not only the lives of those who use drugs but forcing society to shoulder the staggering costs associated with drug use. I am aware of studies such as the NIDA National Household Survey (1982 and 1985) showing that 19% of all Americans over the age of 12 have used illicit drugs during the last year (36.8 million), and that over 12% have used illicit drugs in the last month. These studies also show that: (1) 65% of those entering the workforce (18-25 years old) have used illegal drugs, and over 45% of those individuals reported using illegal drugs in the past month; (2) 20 million Americans use marijuana at least once a month; (3) 12.2 million Americans used cocaine at least once during the past year, and 5.8 million used cocaine during the last month.

6. The prevalence of drug abuse in society has had staggering costs both for society as a whole and for employers in particular. Studies indicate that the cost to the U.S. economy of drug abuse in 1983 alone totalled over $59 billion dollars, including over $33 billion in reduced worker productivity, over $20 billion in costs associated with crime, victims of crime and incarceration, and over $2 billion in treatment and support. (Economic Costs to Society of Alcohol and Drug Abuse

and Mental Illness: 1980, Research Triangle Institute, ADAMHA, updated through 1983). In addition, I am aware of several studies showing that employees who use drugs have 3-4 times more accidents while at work, and an absentee rate of 2.5 times more than non-users.

7. As incidents of drug abuse have soared in recent years, so too has the level and sophistication of drug smuggling activities by international criminal enterprises. By frequently changing source locations and smuggling routes, and by using more elaborate methods of concealing large quantities of narcotics, drug traffickers present a formidable challenge to the Customs Service in its efforts to interdict large narcotics shipments. The most notable challenge has involved the smuggling of massive amounts of cocaine into the country. Two of the largest cocaine seizures ever made occurred during 1986, and over the past three years ten cocaine seizures exceeded 2,000 pounds. Heroin production in source countries and heroin smuggling to the U.S. has also been on the rise in recent years. Two of the largest ten heroin seizures ever made occurred within the last eighteen months. According to the National Narcotics Intelligence Consumers Committee, the amount of heroin smuggled into the U.S. has increased from about four tons to six tons during the last five years. The President's Commission on Organized Crime estimated that drug proceeds provided organized crime with approximately $110 billion dollars in the last year alone.

The Congressional Mandate

8. The United States Congress has, in recent years, demonstrated increasing concern with the rising tide of illegal drugs coming into the United States. In appropriating funds for fiscal 1987, Congress specifically recognized the high level of drug abuse and related crime in this country, and stated that this monumental problem "requires a strong law enforcement effort to stem

the tide of illicit drugs coming into the United States." Recognizing that any reduction in the Customs budget would have a severe impact upon Customs' ability to interdict the flow of such drugs into the country, Congress appropriated a record sum—over $1 billion (an increase of 26.4% from last fiscal year)—to Customs for the fiscal year, and provided funding for approximately 1000 additional Customs personnel to help deal with this national problem. Congress has given this agency a clear mandate to stop the flood of illegal drugs across our borders, and has told the agency to hire an unprecedented number of new employees in sensitive positions. Almost all of these positions involve drug enforcement, carrying firearms, and/or access to classified information.

The Dilemma

9. Customs is dedicated to carrying out its mandate as a leading federal drug enforcement agency, and it intends to vigorously use the additional resources provided by Congress to continue its battle against the flow of illegal drugs into the country. However, as Commissioner of the U.S. Customs Service, I believe that filling such a large number of sensitive positions from an applicant pool both inside and outside the Service, without first drug testing those applicants to insure that they are fit for drug law enforcement positions of trust, is dangerous and fundamentally inconsistent with the mission of the Service.

10. While I am unaware of any specific drug "problem" among either the internal or external applicant pool for sensitive Customs positions, as Commissioner of an agency whose mission is to interdict illegal drugs I am aware that this applicant pool is drawn from a society where drug abuse is widespread. I have no reason to believe that this applicant pool is somehow immune to a problem that has pervaded all socio-economic classes of our society. Indeed, it would be irresponsible for this

agency to ignore in the hiring process the possibility that a significant portion of applicants are violating the very laws that Customs has a responsibility to uphold. I believe that drug testing is the most reliable, least intrusive and only feasible manner in which this agency can determine whether an applicant uses illegal drugs. Drug testing, like a background investigation, is an essential part of the employment process for sensitive positions at Customs.

11. Use of illegal drugs is simply incompatible with the three types of sensitive positions outlined in the Customs Directive. Testing of employees directly involved with "drug interdiction and enforcement of related laws" is critical because such employees are routinely in contact not only with the actual illegal substance, but also with the criminal network that is tied to illegal drug use. As a part of their duties, these employees are often placed in difficult, dangerous situations where the success of the mission, their own life, and the lives of coworkers depends upon their ability to think and react clearly and quickly. Illegal drug use dulls the ability to think and react quickly, clouding the employee's judgment and endangering other lives and government property. Moreover, illegal drug use renders such employees morally unfit for duty, as violation of the law undermines both an agent's ability to enforce the law on a fair and impartial basis and public trust in the integrity of the Service. Indeed, the liberties of other citizens are often dependent on the good judgment of these Customs employees who have the full range of police powers.

12. The second category of positions covered by the directive are persons required to carry firearms. Public safety demands that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free. There is no reason why the public must bear the risk that public officials authorized to employ deadly force may be suffering from impaired perception and judgment.

13. The Directive also authorized testing for employees with access to classified material. Employees who use illegal drugs and who are given such access may be bribed into disclosing such information to a criminal drug enterprise, and they may have a financial need to exchange information valuable to smugglers in order to support their habit. Given the incredible sums of money involved, it is not surprising that Customs Officers have been the targets of bribery by drug smugglers on numerous occasions, and several Customs officers have been removed for accepting such bribes and other integrity violations in past years.

14. Faced with this Court's Order enjoining the very drug tests so critical to determining the suitability of applicants for critical positions, and at the same time faced with an unprecedented number of critical positions to fill and a congressional mandate to stem the flow of illegal drugs into this country, the United States Customs Service is confronting a recruitment and hiring crisis that has had an immediate adverse effect upon the ability of the Service to carry out its responsibilities. In addition to the 1000 new positions recently created by Congress to increase drug enforcement efforts, there are approximately 1,450 current vacancies which require drug screening, and several hundred additional vacancies are expected in covered positions over the next few months due to normal attrition.

Impact of the Court's Order

15. Due to the threat that drug use by persons in sensitive positions poses to the Service, I have reluctantly concluded that the massive recruitment and hiring process that the Service had planned to fill the unprecedented number of vacant sensitive positions cannot go forward at this time without drug screening. This massive hiring drive will have a tremendous impact upon the Customs Service for years to come. Given the high percentage of drug use in society as a whole (and presumably the large applicant pool from which these sensitive employees will be selected), drug screening is necessary to ensure that the person hired and entrusted with the enforcement of our nation's drug laws are not drug users themselves. Therefore, I have taken the following steps:

(a) all drug testing previously scheduled or about to be scheduled has been stopped;

(b) Customs is not extending firm commitments of employment to candidates tentatively selected for positions requiring drug screening who had not previously completed this requirement; this includes both internal and external candidates selected for such positions;

(c) at this time, recruitment bulletins and vacancy announcements for positions requiring drug screening are no longer being issued.

16. At the time of the injunction, we stopped recruitment action on over 90 candidates who were about to be scheduled for drug screening. In the three days following the order, approximately 170 additional letters of tentative selection have been stopped, due to the requirement for drug screening. In addition, we estimate that at the current time, over 400 recruitment actions are close to the point of selection. None of these actions can proceed further without completion of drug screening, or an abandonment of our firm conviction that preemployment drug screening is as critical as a pre-employment background investigation. We have been scheduling approximately 56 candidates per week for drug screening. Therefore, for each week that hiring is delayed, 56 recruitment actions are "put on hold."

17. It is critical that Customs resume normal recruitment activities as soon as possible. The recruitment process in the Federal government is lengthy and complex; it is always difficult to attract and retain high

quality candidates. Additional delays in this process adversely affect both the quality and quantity of the applicant pool.

18. Curtailment of hiring activities for law enforcement occupations also has a negative and substantial impact on our training programs. Customs law enforcement occupations require lengthy formal training (a minimum of nine weeks) at the Federal Law Enforcement Training Center (FLETC), in Glynco, Georgia. This training is mandated and new employees cannot carry out their law enforcement duties (i.e., they cannot carry firearms or badges) until they have successfully completed training requirements. Since we cannot hire for our key occupations, we will be forced to cancel upcoming classes at FLETC. In addition, scheduling training with FLETC requires several months lead time, since this training is subject to the constraints of the FLETC facility and availability of instructors. Therefore, when we do resume hiring, a major training bottleneck will occur. At that point, we would be forced into further recruitment delays, since we would not appoint large numbers of employees who could not be trained.

19. The curtailment of recruitment has two major impacts on Customs programs. First, we will be unable to meet the Congressional and Presidential mandate to enhance the Government's ability to interdict illegal drugs. The second major impact is on the existing vacancies in the Service, which may not be filled without drug screening.

20. All Customs duty stations, both large and small, face serious operational problems when there are ongoing vacancies. Delays in filling positions not only have a deleterious affect on drug interdiction, but also on the travelling public and importing community. Continuing turnover and the inability to fill positions create significant problems in terms of the quality of the workforce, morale, operational effectiveness, etc.

21. In addition, numerous senior level vacancies, both supervisory and managerial, are frozen, due to the requirement for drug screening. The impact on program administration, supervision and management of the workforce and decision-making is severe, and will increase the longer these positions remain vacant.

22. In summary, the order to cease drug screening has a severe negative impact on the Customs Service. Since we feel that it would be irresponsible to hire without first insuring through drug testing that the candidates are fit for law enforcement positions of trust, we cannot meet the Congressional mandate to fill drug enforcement positions; we experience serious disruption in ongoing Customs operations and programs; and, our recruitment posture both in terms of the quality and quantity of the potential workforce is adversely impacted. Finally, the problems associated with delays expand rapidly with each day of this curtailment of hiring. We must hire and train new appointees at a balanced rate so that they can be incorporated into the workforce and function as law enforcement officers as soon as possible.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of November, 1986.

/s/ William von Raab
WILLIAM VON RAAB,
Commissioner

SUPREME COURT OF THE UNITED STATES

No. 86-1879

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Petitioners

v.

WILLIAM VON RAAB, Commissioner,
United States Custom Service

ORDER ALLOWING CERTIORARI

Filed February 29, 1988

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

PETITIONER'S

BRIEF

(5)

No. 86-1879

Supreme Court, U.S.
FILED
MAY 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Petitioners

v.

WILLIAM VON RAAB, COMMISSIONER,
UNITED STATES CUSTOMS SERVICE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONERS

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50 pp

QUESTION PRESENTED

Whether the Customs Service's Drug Screening Program violates the Fourth Amendment where:

1. It requires employees, as a condition of promotion, to urinate under close observation and to surrender their urine samples to the government for chemical testing to detect evidence of illegal drug use; and

2. The tests are conducted without probable cause or even reasonable grounds to believe that particular employees use illegal drugs; and

3. The program was implemented despite the fact that Customs conceded that its work force was already largely drug free; and

4. Undisputed expert testimony shows that the tests are ineffective to either detect illegal drug use or deter drug-using employees from seeking covered positions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1879

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Petitioners

v.

WILLIAM VON RAAB, COMMISSIONER,
UNITED STATES CUSTOMS SERVICE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 816 F.2d 170. The opinion of the court of appeals denying the government's motion for a stay pending appeal (*id.* at 29a-39a) is reported at 808 F.2d 1057. The opinion of the district court (Pet. App. 40a-60a) is reported at 649 F. Supp. 380.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1987. The petition for a writ of certiorari was filed on May 27, 1987. This Court granted the petition on February 29, 1988. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. This case arose out of a suit brought against the Commissioner of the United States Customs Service by the National Treasury Employees Union (the exclusive bargaining representative of 9,000 Customs employees) and Argent Acosta (an NTEU chapter president and Customs inspector). J.A. 3-9. The Union and Acosta sought an injunction on behalf of current Customs employees against implementation of Customs' newly created "Drug Screening Program," which they alleged violated the Fourth Amendment rights of covered employees. Petitioners prevailed in district court; the court ruled the Customs program unconstitutional and enjoined it. Pet. App. 40a-60a. However, in a split decision, on expedited appeal, the Fifth Circuit reversed, vacating the district court's injunction. *Id.* at 1a-27a.

a. The United States Customs Service is a federal agency responsible for collecting revenue from imports, enforcing customs and related laws, and processing persons, carriers, cargo and mail into the United States. One of the Customs Service's many important responsibilities is the interdiction and seizure of contraband, including illegal drugs.

In the summer of 1986, the Customs Service implemented a drug screening program applicable to current employees selected for promotion to certain covered positions. Pet. App. 3a.[1] The Commissioner of Customs established the drug screening program, not in response to any problem of drug abuse in the agency, but in an attempt to obtain further assurances that Customs employees are not illegal drug users, in view of the drug interdiction duties of the Customs Service. J.A. 10, 15, 72. Under the Customs program, current employees who have competed and been selected for promotion into certain covered positions, are required to urinate under "close" but not "direct" observation,[2] and provide the urine specimen to the Customs Service for chemical analysis. This analysis attempts to detect recent use of marijuana, cocaine, opiates, amphetamine, or phencyclidine (PCP). J.A. 23-25; 32.[3]

Procedures for collection and analysis of urine samples are outlined in a directive issued to employees in August of 1986. J.A. 23-41. In accordance with the Directive, after Customs considers the qualifications of the employee applicants and selects those it finds suitable for promotion or transfer, it sends out a notice that informs the tentative selectee that he or she must submit to a

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[1] Two months earlier, the Customs Service implemented a pre-employment drug screening program for outside applicants. Pet. App. 3a. Petitioners did not purport to represent outside applicants in bringing this lawsuit, and the validity of the pre-employment drug screening program is not before the Court. *Id.* at 21a.

[2] Customs uses this terminology to describe the monitor's responsibility to be watchful of the employee's behavior in the bathroom, and to listen to, but not to actually watch, the employee urinate. *See, e.g.*, J.A. 29-30, 74, 92.

[3] The drug screening program covers employees promoted or transferred to positions that are said to "directly" involve drug interdiction, or that require the incumbent to carry firearms, or that allow the incumbent access to "classified information," by which apparently is meant sensitive or confidential information. J.A. 24-25. In its Directive and during this litigation, Customs identified over fifty specific covered positions which meet these general criteria. *Id.* at 37-39. The positions ranged from clerical to professional, and included mail technicians, chemists, lawyers, criminal investigators, senior administrative personnel, student trainees, and others. *Id.*; Pl. Exh. 17.

urine test in order to be placed in his or her new job. *Id.* at 26-27; 33; 75; 79-85. After allowing five days for receipt of the notice of tentative selection, the "Drug Screening Coordinator," a Customs official, contacts the urine collection agent, a private company, which in turn contacts the employee and directs him or her to report to a designated location, at a designated time, to produce a urine sample. *Id.* at 20; 27; 75-76; 79-85.[4]

Employees provide urine samples either in a restroom at their place of employment or in an off-site collection facility. J.A. 20; 27-28; 55; 57-58; 96-97. Upon arriving at the designated collection site, the employee is required to produce identification and asked to detail to a representative of the urine collection company any medication taken in the last 30 days. *Id.* at 20-21; 28-29; 55; 75; 86-87; 98-99; 102-103.[5] To facilitate disclosure, employees are advised to bring notes from their physicians or other documents showing the date of prescriptions, type and concentration of medications prescribed, frequency of use, date last taken, and name of the prescribing physician. *Id.* at 21. Prescription information is recorded by the laboratory representative on a form, which is signed by the employee. *Id.* at 21; 28-29; 86-87; 98-99; 102-103.[6]

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[4] The Customs Service has contracted with "Equifax-PMI" ("Physical Measurements Information"), a private company with 200 offices nationwide to collect urine from tentative selectees to covered positions. J.A. 74-75; 91-92; 95-96. The personnel assigned to perform this task are not required to possess medical or scientific training. *See* J.A. 58 (inexperienced former insurance adjuster assigned to collect urine samples).

[5] Employees are also asked to state whether they have come into contact with illegal substances in the performance of their duties in the preceding thirty days and whether they have consumed any foods rich in poppy seeds in the last 48 hours. J.A. 29; 86; 88; 102. Consumption of such foods may cause an individual to produce a test positive for opiates. *Id.* at 88.

[6] The form is produced in triplicate. One copy of the form is sealed in an envelope and forwarded to the Drug Screening Coordinator, to be opened in the event that the urine sample is reported positive. Another copy is retained by the urine collection company. The third copy is kept by the employee. J.A. 101.

An employee who fails to provide medical and prescription information is not precluded from taking the test. J.A. 29, 87, 103. However, several of the drugs sought under the Customs program have legitimate uses, and other drugs discolor urine. *Id.* at 21. Therefore, an employee who makes no disclosure or less than full disclosure bears the risk that a positive result on the drug test will be attributed to illegal activity rather than legitimate use of prescription medication, or that he or she will be accused of tampering with the urine sample. *Id.* at 33-35; 87.

After outlining their medications and signing the form, employees are required to produce a urine sample under the "close but not direct" observation of a monitor of the same sex. J.A. 21-22; 29; 55; 58; 96. The employee is ordered to surrender outer garments such as coats and jackets, and personal belongings, and then directed to urinate into a specimen cup either behind a partition or in a closed stall. *Id.* The collection site monitor accompanies the employee into the restroom or stands outside the bathroom door, listening closely while the employee urinates. Pet. App. 4a.[7]

In an attempt to prevent cheating on the test, the monitor adds dye to the toilet water (J.A. 55), listens for

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[7] Close scrutiny of the act of urination is required to maintain the integrity of urine testing programs because samples can be easily adulterated by the addition of common and easily concealed items like table salt or hand soap. J.A. 60; 66. In addition, some drug users may attempt to thwart the test by substituting another's "clean" urine sample for their own. *Id.* Plaintiffs' undisputed expert testimony in this case established that the only way to assure that sample switching or adulteration has not occurred is by direct observation of the urinary stream, from the body to the cup. *Id.* Absent this form of observation, it is likely that, as Dr. John Morgan explains, "knowledgeable drug abusers will beat the test while those more naive will yield up honest specimens." *Id.* at 60.

the "normal sounds" of urination (Pet. App. 4a; J.A. 55; 58), and watches for any suspicious behavior that suggests the employee is attempting to adulterate his or her sample. J.A. 29. The monitor also inspects the sample to assure its proper temperature, color, and quantity. *Id.* at 30.[8] Employees found to have attempted to adulterate their urine samples are subject to dismissal. *Id.* at 33. Employees who are unable to produce a quantity of urine sufficient for testing will be detained and given fluids to drink, and, if still unsuccessful, asked to return later in the day. *Id.* at 30. Those still incapable of producing a urine sample later in the day are disqualified from receipt of their promotions. *Id.* Any employee who refuses to produce a urine sample or is unable to do so is ineligible for promotion. *Id.* at 36. Employees who submit to the test and whose results are reported positive are subject to removal from the Customs Service. *Id.* at 35-36.

b. It is undisputed that the Customs drug screening program was not implemented in response to a real or perceived drug problem either in the Customs workforce as a whole, or in any segment thereof. J.A. 10; 15; 53. Instead, its professed purpose is to provide some extra assurance of the integrity of those who hold covered positions, given Customs' role in the interdiction of drugs at the border, and a perceived epidemic of drug use in society at large. *Id.* at 10; 15; 23; 72; 112-113.[9]

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[8] Under mandatory guidelines recently issued by the Department of Health and Human Services pursuant to Executive Order 12564, 51 Fed. Reg. 32889, *et seq.* (September 17, 1986), to which all urine testing programs in the federal sector must conform, the monitor is authorized, upon consulting with his or her supervisor, to require employees he or she suspects of tampering with their samples to produce a new one, under *direct* observation. *See* 53 Fed. Reg. at 11981 (April 11, 1988).

[9] When Commissioner von Raab announced the program, he confessed that "the extent of illegal drug use by Customs employees was not the reason for establishing this program." J.A. 15. The

Thus, it is undisputed that when Customs implemented its program in 1986, it had no reason to suspect that drug use, either on or off duty, was occurring undetected in its workforce. Customs submitted no evidence in this case that any past on-the-job accidents or integrity violations had ever been attributed to employee drug use. In fact, one month before he implemented the program, Commissioner von Raab explicitly declared his belief that Customs was "largely drug free" and confirmed that "[t]he Customs Service has been known throughout the law enforcement community as an agency whose employees demonstrate noteworthy integrity." J.A. 10; 12. In its 200-year history, the Customs Service has handled problems of misconduct by traditional Fourth Amendment means. It made no attempt to show, either in administrative proceedings or in this litigation, why it decided to abandon those traditional methods.[10]

The Customs drug screening program was in effect for five months before the district court enjoined it. For three of those months current employees selected for promotion were required to participate. During that period all test results for current employees were reported negative. Pet. App. 4a. In recent testimony be-

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Directive states that drug testing is nonetheless justified because Customs has a "special responsibility to insure that its workforce remains drug free." *Id.* at 23.

[10] During the proceedings before the district court on the merits, Customs made no attempt to show any drug problem in its workforce or any reason to suppose such a problem was likely to arise absent implementation of drug testing. *See* Pet. App. 58a-59a. After plaintiffs won an injunction against the program in district court, however, Customs submitted an affidavit of Commissioner von Raab in support of their unsuccessful request for a stay pending appeal. J.A. 107-117. In that post-decisional affidavit, Commissioner von Raab indicated generally that a "few" Customs employees had been fired for "integrity violations" in the preceding few years. *Id.* at 114. The Commissioner's affidavit however, did not attribute these admittedly "few" known integrity violations to drug usage.

fore Congress, Commissioner von Raab stated that after having conducted approximately 3663 urine tests under its program (including tests of outside applicants), only five samples, or .001365%, have been confirmed positive. *Hearings on FY 1989 Appropriations before the Senate Subcommittee on Treasury, Postal Service, and General Government Appropriations*, February 26, 1988, p. 68 (unpublished transcript).

c. Despite its recent popularity, urine testing is a relatively blunt and imprecise forensic instrument, especially as compared to other analogous procedures, like blood alcohol testing or the breathalyzer. It is uncontested that a positive urine test, even where accurate, can only indicate that at some time in the relatively recent past, the subject ingested a controlled substance. J.A. 60-61; 65-66. The test cannot determine the frequency of use, the dosage, the time of use, whether the employee is or was ever impaired by the illegal drug, whether the drug was taken under legitimate prescription, or even whether it was ingested voluntarily. *Id.*

Under the Customs program, urine samples are sent by mail to a laboratory in California for analysis. J.A. 100.[11] Urine samples are first subjected to a relatively insensitive screening test, the "enzyme multiplied immunoassay test" (EMIT). *Id.* at 25; 32; 41; 74. The EMIT searches for metabolized remnants of the specified drug that are contained in urine. *Id.* at 64; 104-105. The EMIT will fail to identify most users of illegal drugs, however, because drugs become undetectable very rapidly after their ingestion, and because individuals can change a test from positive to negative by increasing fluid intake. *Id.* at 60-61; 66-67; 69-71. Using the cut-off levels established by the Customs Service (J.A. 41),

[11] The Commissioner of Customs established a "Task Force" to determine how to implement this program. J.A. 11. It produced no administrative record to enable the Court to review its deliberations.

all of the searched-for drugs, except marijuana, are detectable for only a few days after they are used. *Id.* at 60-61; 66. Marijuana is detectable for averages of one day for light users (use once a week), three days for heavier users (two to six times per week), and an average of 5.3 days for very heavy users (daily use or more frequently over a six-month period). *Id.* at 66. Undisputed expert testimony in this case demonstrated that with a few days notice, virtually any individual who uses illegal drugs, except those whose use is so habitual as to be detectable simply by observation on the job, can escape detection through urinalysis merely by temporary abstinence.[12]

Under the Customs program, urine samples that are found to be negative through the EMIT procedure are not subjected to any further analysis, and the employee will be placed in the covered position to which he or she has been promoted, and will not be asked to repeat the procedure. J.A. 32. Those samples that are initially reported positive, on the other hand, are subjected to a confirmatory test which utilizes the gas chromatography/mass spectrometry (GC/MS) technique. *Id.* at 25; 32; 74. The GC/MS technique is considered by toxicologists to be capable of reliably detecting the presence of specified drugs in a urine sample when it is properly conducted. *Id.* at 62; 65; 70; 105. Its reliability, however, is compromised by the possibility of sample switching,

[12] Plaintiffs' expert, Dr. David Greenblatt, in an uncontested affidavit, characterized the Customs program as "essentially useless for determining whether employees use illegal drugs because of the likelihood of a high false negative rate and because most individuals who use illegal drugs can avoid a 'true positive' result by abstaining from the use of drugs upon receiving short notice that they will be tested, and by increasing their fluid intake." J.A. 70. Similarly, Dr. John Morgan noted that "[g]iven a week's notice, generally only addicts and the most chronic users would not be able to produce a clean sample . . . It is likely that misuse of drugs by such persons would have manifested itself in behavior, absenteeism, or poor performance." *Id.* at 61.

contamination, or errors in analysis, all of which are particular causes of concern in large-scale testing programs. *Id.* at 62; 65; 70.

2. The district court, in a strongly worded opinion, found that the Customs drug screening program is a "degrading" and "overly intrusive" procedure (Pet. App. 51a, 55a) and ruled it unconstitutional. *Id.* at 40a-62a. It held (consistent with every court to consider the issue) that urine testing is a "full-blown search" within the meaning of the Fourth Amendment. *Id.* at 50a-51a. The court observed that a urine test is no "minor frisk or pat-down," and viewed "the testing of Customs workers' bodily wastes" as "even more intrusive than a search of the home." *Id.* at 50a. Indeed, said the court, "excreting body fluids and body wastes is one of the most personal and private human functions." *Id.* at 52a.

The district court weighed this significant intrusion against the government's asserted interest in a "drug-free" workforce. Without questioning the legitimacy of that interest, the court found that Customs had failed to demonstrate that its interest was threatened. Pet. App. 58a-59a. It noted the "conspicuous absence of any statistics by the defendant showing any drug problem whatsoever among federal workers," and that Customs in particular had failed to demonstrate a drug problem among its employees. *Id.* at 58a, 59a. The court held that the program violated the Fourth Amendment since it mandated testing absent probable cause or even reasonable suspicion to believe that an employee uses illegal drugs. *Id.* at 59a. Accordingly, the court enjoined the Customs Service from conducting urine tests without probable cause. *Id.* at 60a.

3. In a split decision, on expedited appeal, the court of appeals reversed. Pet. App. 1a-27a. Applying a multi-factor "totality of the circumstances" approach, the majority ruled that Customs' interest in employing persons who do not use illegal drugs in covered positions is sufficient to outweigh the program's conceded infringement of employees' expectations of privacy.

Initially, the court ruled that urine testing is a "search" and rejected the government's arguments that the Fourth Amendment is inapplicable where the government seeks to determine employees' fitness for duty. Pet. App. 7a-9a. The court recognized that urine testing infringes employees' privacy expectations in several ways. It observed that "there are few activities in our society more personal or private than the passing of urine," and that "even the individual who willingly urinates in the presence of another does not 'reasonably expect to discharge urine under circumstances making . . . .discover[y of] the personal physiological secrets it holds possible'." [13] The court also recognized that urine testing "may disclose not only the presence of drug traces but much additional personal information about an employee —whether the employee is under treatment for depression or epilepsy, suffering from diabetes, or, in the case of a female, pregnant." "Even tests limited to the detection of controlled substances," the court observed, "will reveal the use of medications prescribed for the relief of pain or other medical symptoms." *Id.* at 8a.

Despite these privacy concerns, and the fact that the urine searches are conducted without probable cause to believe an employee is guilty of work-related misconduct or even reasonable suspicion of same, the majority upheld the program. It found that Customs had tried to minimize the intrusiveness of urine testing by not requiring visual observation of the urinating employee and by giving employees notice that they would be tested. It also viewed the program as "limited in total scope" because no discretion is exercised in deciding which employees are to be tested; instead, all employees selected

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[13] Pet. App. 8a, quoting *Capua* v. *City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986) and *McDonell* v. *Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa, 1985), *aff'd as modified*, 809 F. 2d 1302 (8th Cir. 1987).

for promotion are required to undergo the test. Pet. App. 11a-12a.

The court observed that no attempt had been made to justify the program on the basis of the existence of drug use among current employees. Pet. App. 3a-4a. The court nonetheless found the demand for urine specimens reasonable under the Fourth Amendment because drug use by Customs employees could, if it in fact occurred, "seriously frustrate the agency's efforts to enforce the drug laws" by undermining public confidence in the agency and by making employees susceptible to blackmail or bribery. *Id.* at 13a. The court also observed that drug use by persons who carry firearms could present a danger to the employee himself and to co-workers. *Id.*

The court of appeals concluded that alternative employee screening devices, such as background investigations and on-the-job observation, are inadequate and "do not eliminate the need for urine testing," even though these devices have apparently produced a "drug-free" workforce at Customs. Pet. App. 17a. The court conceded that because the program would invade privacy, it had to consider whether the program would be a " 'sufficiently productive mechanism' for achieving its purposes." *Id.* at 18a, *quoting Delaware* v. *Prouse*, 440 U.S. 648, 659 (1979). Although the court acknowledged that "the test will usually fail to detect drugs used more than five days before testing and employees notified of a testing date may simply abstain from use", it found that an addict might not be able to abstain. *Id.* Despite undisputed expert testimony to the contrary (J.A. 61; 70), the court found that a "particular user" faces significant risk of detection, which risk "may deter" a drug user from applying for a covered position. *Id.*

4. Judge Hill dissented from the majority's ruling. He agreed with the court's conclusion that the Customs program is subject to the requirements of the Fourth

Amendment but did not agree that the program in fact met those requirements.

Initially, Judge Hill expressed his "reservations with the method of analysis used by the majority in deciding whether the program is reasonable under the Fourth Amendment." Pet. App. 23a-24a, n.1. Specifically, Judge Hill noted that "the majority offers no explanation why this case presents a situation where no warrant, no probable cause, nor even any level of suspicion is required, contrary to the language of the fourth amendment." *Id.*

Judge Hill did not himself engage in the analysis he suggested was necessary because he agreed with the plaintiffs' alternative argument that the ineffectiveness of the Customs program, in and of itself, rendered the program unconstitutional. He recognized that employees need only abstain from use following receipt of notice of the testing requirement in order to avoid detection as a drug user, and that a one-time drug test would be ineffective to achieve the government's stated goals of deterring drug users from seeking covered positions. *Id.* at 26a. Given the ineffectiveness of the Cutoms program, Judge Hill could perceive "no reason to allow this invasion of the employees' fourth amendment rights without some concomitant benefit to society." Pet. App. 26a-27a.

SUMMARY OF ARGUMENT

A. The purpose of the Fourth Amendment—to protect citizens against arbitrary interference with their personal privacy and dignity at the hands of the state—is directly implicated by programs that require those who work for the government to produce urine samples, under observation, for chemical testing. As all courts to consider the issue have agreed, urine testing violates reasonable expectations of privacy in both the act of urination and in the product urine itself. Urine tests must therefore be considered "searches" within the mean-

ing of the Fourth Amendment, and are subject to that Amendment's standards of reasonableness.

B. The determination of the reasonableness of a search requires, at bottom, a weighing of the government's interest in conducting the search against its intrusion into personal privacy and dignity. *O'Connor* v. *Ortega*, 107 S.Ct. 1492, 1499 (1987) (citations omitted). Here, the Customs Service relies upon its interest in a "drug-free" workforce to justify its program. However, it freely admits that it had no reason to believe that interest was in jeopardy when it implemented urine testing. The government must do more than recite an important interest in order to justify intrusive searches; otherwise the Fourth Amendment balance will inevitably be struck in the government's favor. The government must demonstrate that its invasion of privacy is necessary. Customs' claimed authority to conduct drug tests without probable cause, without reasonable suspicion, and, indeed, without demonstrating that its interest in a drug-free workforce was ever in jeopardy, exceeds any authority this Court has ever recognized as legitimate. Regardless of the standard this Court finds appropriate, probable cause, or something less, the Customs program cannot stand.

C. The Customs Service has failed to justify its departure from the Fourth Amendment's presumptive requirement—that searches or seizures proceed only where there is probable cause to believe that the search will uncover the evidence the government seeks. Last Term, in *O'Connor* v. *Ortega*, the Court confirmed that this presumptive requirement is fully applicable in assessing the reasonableness of searches conducted in the employment context. 107 S. Ct. at 1499, 1501.

The Framers of the Constitution established the probable cause standard in order to strike a balance between the community's need for evidence and the individual's interest in maintaining a sphere of personal privacy and dignity. *E.g.*, *Winston* v. *Lee*, 470 U.S. 753, 758 (1985).

This Court has permitted departure from the Amendment's presumptive requirements only where the interference with Fourth Amendment interests is minor, and where "'special needs beyond the normal need for law enforcement'" necessitate searches or seizures upon less than probable cause, or without a warrant. *O'Connor* v. *Ortega*, 107 S. Ct. at 1500; *quoting New Jersey* v. *T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment).

Neither element necessary to justify departure from the probable cause standard is present in this case. Urine tests are highly invasive of personal privacy and dignity, far more so than any other search or seizure this Court has ever permitted in the absence of probable cause. In accordance with the Customs program, innocent employees who are under no suspicion of wrongdoing, and, indeed, who have been chosen for advancement, are required to urinate under the scrutiny of monitors, to reveal intimate medical information to these monitors and to their government employer, and to permit their urine to be analyzed for evidence of illicit conduct. This procedure cannot be compared to brief detentions of criminal suspects upon reasonable suspicion, or to inspections of commercial property used in closely regulated businesses, or to any other intrusion this Court has permitted upon less than probable cause. *E.g.*, *Terry* v. *Ohio*, 392 U.S. 1 (1968); *New York* v. *Burger*, 107 S.Ct. 2636 (1987).

Moreover, Customs has not demonstrated the existence of "operational necessities" that preclude it from basing its demand for urine samples upon probable causes. *See Arizona* v. *Hicks*, 107 S. Ct. 1149, 1154 (1987). Customs' interest in hiring employees in covered positions who do not use illegal drugs is unchallenged; however, accepting that proposition does not justify the use of illegal searches to accomplish the government's goals. Cus-

toms has the opportunity to study individual employees both while they are on the job, and during the selection process, and can gather the facts giving rise to probable cause to believe that particular employees use illegal drugs, without any compromise to its effectiveness or the public safety. Moreover, Customs officials are well schooled in application of the probable cause standard, so that use of the standard during the selection process should not prove overly burdensome.

D. Should this Court regard the probable cause standard inapplicable here, petitioners should nevertheless prevail. The Customs program fails even the less rigorous test of reasonableness under all the circumstances, outlined in this Court's decision in *O'Connor* v. *Ortega* and other cases. The urine tests Customs conducts are neither "justified at [their] inception" nor "reasonably related in scope to the circumstances which justified the interference in the first place." *O'Connor* v. *Ortega*, 107 S. Ct. at 1502-1503, *quoting Terry*, 392 U.S. at 20, and *T.L.O.*, 469 U.S. at 341.

A search in the employment context is justified at its inception when there are "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct." *O'Connor* v. *Ortega*, 107 S. Ct. at 1503. Customs has no reasonable grounds to believe its program will uncover work related misconduct because the program does not require individualized suspicion of drug use by particular employees, and because, in any event, Customs has no reasonable grounds to believe the tests will reveal drug use by *any* employee.

Only the most minimal interferences with Fourth Amendment interests have been permitted in the absence of individualized suspicion. Urine tests involve an invasion of privacy and dignity that is greater than any previously permitted to occur in the absence of individualized suspicion, even where, as here, the searches are

based upon neutral criteria, and the individual searched has notice of the impending intrusion. *Cf. United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). Notice of a highly intrusive search does not enhance its reasonableness, nor does expanding its reach (by eliminating all discretion) to cover ever greater numbers of persons.

Moreover, Customs has not met its burden of demonstrating that even a minor interference with Fourth Amendment interests is justified in this case. The government's burden of justifying a search program that includes no element of individualized suspicion at all should be a weighty one indeed. While Customs has an interest in assuring that its employees are not users of illegal drugs, such an abstract interest is insufficient to justify intrusions into the privacy of the great majority, who are innocent of the wrongdoing the government seeks to uncover. Customs has never attempted to explain why including an element of individualized suspicion in its program would frustrate accomplishment of its objectives.

Even if individualized suspicion is not the constitutional minimum for conduct of urinalysis drug testing, the Customs program should still be invalidated because there are no reasonable grounds to assume the program will further the government's purported interest in a "drug-free" workforce. Customs has conceded that its workforce is already "drug-free," so it is clearly unreasonable to institute new, invasive searches to uncover or deter drug use. Moreover, the program it has enacted is completely ineffective to accomplish its goals, since it is easy for a drug user to thwart the test simply by temporary abstinence or subterfuge. It is simply irrational to assume that persons who use illegal drugs will be deterred from applying for a covered position by an ineffective urine test, but not by a background investigation or by the knowledge that behavior will be closely observed and that illegal drug use will result in dismissal. In short, the government's proffered justifica-

tion for imposing this urine testing plan—the need for further assurances that Customs employees in covered positions do not use illegal drugs—is neither established in this case, nor served by the Customs program. This Court should rule the program unconstitutional.

ARGUMENT

THE CUSTOMS DRUG SCREENING PROGRAM VIOLATES THE FOURTH AMENDMENT IN THAT IT IMPOSES ON EMPLOYEES HIGHLY INTRUSIVE SEARCHES WITHOUT PROBABLE CAUSE TO BELIEVE THAT INDIVIDUAL EMPLOYEES USE ILLEGAL DRUGS, WITHOUT REASONABLE SUSPICION THAT AN INDIVIDUAL USES DRUGS, AND WITHOUT GENERALIZED SUSPICION OF ANY DRUG PROBLEM IN THE WORK FORCE

A. Introduction

As this case and others illustrate, the federal government has seized upon a relatively new technology, urinalysis, as an offensive weapon in its war on drugs. The Customs Service is using this weapon on its own employees, requiring them to produce urine samples for laboratory analysis to demonstrate that they are drug-free. It imposes this requirement without probable cause to believe that any individual tested is guilty of any work-related misconduct (in this case illegal drug use), without any reasonable suspicion that an individual is using drugs, and without even a reasonable generalized suspicion that drug abuse exists and constitutes a problem in the workforce. It freely admits that it has no such suspicions.

As we will show, the intrusion upon reasonable privacy expectations occasioned by these tests is so severe that there can be no question that they are searches within the meaning of the Fourth Amendment. The question which the Court must then address is, by what standard must their lawfulness be judged? At bottom, this Court must always decide whether a search is reasonable under all the circumstances, an inquiry that inevitably results in weighing the government's interest in conducting the search against the intrusion it represents upon personal privacy and dignity. *O'Connor* v. *Ortega*, 107 S.Ct. 1492, 1499 (1987) (citations omitted).

In this case, the government has repeatedly emphasized its interest in maintaining a drug-free workforce. Without for a moment suggesting that this interest is an illegitimate one, however, we submit that the inquiry only begins, and does not end there. If all the government need do is recite a weighty interest, without showing that interest is truly jeopardized, the balance will inevitably be skewed in the government's favor, and the Fourth Amendment turned on its head. The Fourth Amendment exists to protect citizens against intrusions by the government that are not demonstrably necessary. Particularly in this case, where the government's showing of the need to search is so meager, the Court must examine whether the government's purported interest is served at all by these searches, and, if so, whether that interest would be adequately served without sacrificing traditional Fourth Amendment protections.

The Customs Service's claim of authority to conduct intrusive searches on its employees without probable cause, without reasonable suspicion, and without any showing that its interest in a drug-free workforce is threatened, exceeds any this Court has ever recognized as legitimate. Under any standard of reasonableness, the Customs program cannot stand.

B. The Fourth Amendment Protects Public Employees in Their Employment Relationship, and the Customs Drug Screening Program Constitutes a Search Within the Meaning of That Amendment.

At issue here are the Fourth Amendment rights of persons who work for the United States Customs Service. They are employed at the nation's borders and elsewhere,

and, among other duties, they work to prevent the illegal entry of persons and contraband, including illegal drugs. The group at risk have performed well for the Customs Service, as demonstrated by the fact that each has sought and been selected for promotion or transfer to new positions. They have never given their employer any reason to believe that they use illegal drugs, either on or off duty.

Nonetheless, each employee selected for promotion is ordered to report to a "collection site," or restroom, to undergo a drug test. The employee is asked to divulge personal medical information, including all medications of any kind taken within the last thirty days, to an agent of the privately contracted urine collection company. The employee must provide proof of identity, surrender outer clothing and personal belongings, and urinate into a specimen cup while a monitor remains close at hand, listening and attending to the employee's actions for signs of suspicious behavior. The monitor is not supposed to actually watch the employee urinate,[14] but must "closely observe" to prevent the employee's cheating on the test, and must take all the precautions expected to preserve the chain of custody, as though protecting evidence of a crime. These include inspection of the urine sample's color, content, and temperature to check for evidence of adulteration or substitution, and ensuring

[14] In practice, indirect observation does not assure privacy in the act of urinating. One employee who underwent this test stated by affidavit that the monitor accompanied each subject into the restroom, placed dye in the urinal, stood behind a partition, and "was able to observe me from my shoulders up from behind the partition while I urinated into the sample jar. I found this procedure embarrassing." Aff. of Lee Cruz, J.A. 55. Another employee said: "The laboratory representative remained in the bathroom with me while I urinated into the bottle at an open urinal. He was not to my knowledge behind a stall or partition. I had my back to [him] during the process, and so do not know how closely he was observing me." Aff. of Benito D. Juarez, J.A. 58.

that the sample is properly sealed, labeled, and dispatched to the laboratory.

Any innocent person facing this test must be expected to regard it as frightening, embarrassing, offensive to personal integrity, or some combination thereof. The district court regarded the urine testing program as exceedingly "degrading." Pet. App. 54a-56a. Professor Charles Fried, commenting twenty years ago on the "symbolic importance" which societies assign to certain "conventionally designated areas of privacy," noted with prescience:

> Thus in our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem.

C. Fried, *Privacy*, 77 Yale L.J. 475, 487 (1968).

Professor Fried's view is shared by most. The degree to which privacy is perceived to be invaded by urine testing may vary from person to person, and, no doubt, depends on a number of variables, including the individual's sex, background or religion, age, experience, and sensitivity, and on the presence of private medical conditions, disabilities, or disorders. In the case of a female employee, it may depend upon the time of the month she is directed to the collection site. But most persons would unquestionably find the process most uncomfortable, if not humiliating, regardless of their individual circumstances. From the apprehension one feels at the prospect of having one's urine captured and analyzed, to the embarrassment of having to urinate on demand in the presence of a monitor, to the outrage one feels at having to divulge to strangers, or to one's employer, a broad range of private medical information, urine tests violate reasonable and normal exceptions of privacy in our society.

Clearly, the Fourth Amendment is implicated by so serious an invasion of privacy. Its "overriding function", as this Court has often recognized, is "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber* v. *California*, 384 U.S. 757, 767 (1966); *Winston* v. *Lee*, 470 U.S. 753, 760 (1985).[15] Moreover, it clearly applies to protect the person and property of public employees. They do not forfeit their protections "merely because they work for the government instead of a private employer." *O'Connor* v. *Ortega*, 107 S. Ct. 1492, 1498 (1987).

Under the Fourth Amendment a "search" occurs, giving rise to the Fourth Amendment's protection, when the government interferes with an expectation of privacy that society is prepared to consider "reasonable." *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984). There can be no doubt that, in our society, the act of urinating, and the urine itself, are surrounded by a very considerable expectation of privacy.[16]

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[15] The Fourth Amendment's protections apply, whether the government acts in a civil or criminal law enforcement capacity. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 334-335 (1985); *Michigan* v. *Tyler*, 436 U.S. 499, 504-505 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523, 528, 530 (1967).

[16] Although we refer throughout to urinalysis as a search, the term "seizure" is equally appropriate. A "seizure" of a person occurs when the government meaningfully interferes with an individual's liberty. *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968). A "seizure" of personal property occurs when the government meaningfully interferes with an individual's possessory interest in the property. *United States* v. *Jacobsen*, 466 U.S. at 113. Although urine is ordinarily not "possessed" for long because it is a waste product, it is clear that ordinarily an individual expects to control both the timing and the ultimate disposition of his own waste. When the government requires its employees instead to urinate on command and then turn the urine over to a government agent for its own purposes, it has interfered in a meaningful way with the employee's authority to dispose of the urine as he or she sees fit. Accordingly, a "seizure" has taken place.

For this reason, the many lower courts that have considered the Fourth Amendment implications of urine testing have unanimously concluded that requiring public employees to produce a urine sample for chemical analysis violates reasonable privacy expectations and therefore constitutes a "search" of the person within the meaning of the Fourth Amendment.[17] This consensus is clearly correct, for the reasons we have discussed above.

Although this Court has not yet had the opportunity to consider whether urine tests constitute "searches," the conclusion that they do finds strong support in this Court's decision two decades ago in *Schmerber* v. *California*. In *Schmerber*, the Court ruled that the extraction and chemical analysis of a motorist's blood to determine its alcohol content "plainly involves the broadly conceived reach of search and seizure under the Fourth

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[17] *Railway Labor Executives' Association* v. *Burnley*, 839 F.2d 575, 580 (9th Cir. 1988), *petition for cert. filed*, No. 87-1555 (March 17, 1988); *Everett* v. *Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987); *Jones* v. *McKenzie*, 833 F.2d 335, 330 (D.C. Cir. 1987), *petition for cert. filed*, No. 87-1706 (April 15, 1988); *National Federation of Federal Employees* v. *Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *McDonell* v. *Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Policemen's Benevolent Association* v. *Washington Township*, 672 F. Supp. 779, 784 (D.N.J. 1987); *Taylor* v. *O'Grady*, 669 F. Supp. 1422, 1434-1435 (N.D. Ill. 1987); *Amalgamated Transit Union, Local 1277* v. *Sunline Transit Agency*, 663 F. Supp. 1560, 1566 (C.D. Cal. 1987); *Feliciano* v. *City of Cleveland*, 661 F. Supp. 578, 586 (N.D. Ohio, 1987); *Rushton* v. *Nebraska Public Power District*, 653 F. Supp. 1510 (D. Neb. 1987); *American Federation of Government Employees* v. *Weinberger*, 651 F. Supp. 726, 732-733 (S.D. Ga. 1986); *Lovvorn* v. *City of Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); *Capua* v. *City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986); *Patchogue-Medford Congress of Teachers* v. *Board of Education*, 517 N.Y.S. 2d 456, 460-461 (1987); *City of Palm Bay* v. *Bauman*, 475 So.2d 1322, 1324 (D.C. App. Fla. 1985); *Caruso* v. *Ward*, 506 N.Y.S.2d 789, 792 (1986).

Amendment." 384 U.S. at 767. The Court emphasized that the Fourth Amendment "expressly provides that the right of the people to be secure in their *persons* . . . shall not be violated." *Id.* (original emphasis). Urine tests designed to detect drugs are materially indistinguishable from blood tests designed to determine alcohol content, since both involve an examination and analysis of body fluids to uncover illicit conduct.[18]

Surveillance by urine testing is being conducted in a rapidly expanding number of contexts, including the military, prisons, drug rehabilitation programs, schools, athletic programs, and, recently, the workplace. Because chemical testing of body fluids without any suspicion of wrongdoing poses a dramatic threat to the values of human dignity and privacy that the Fourth Amendment protects, this Court should affirm the unanimous view of the lower courts which have held that urine tests are "searches," and that the government's authority to conduct urine testing is subject to the limitations imposed by the Fourth Amendment.

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[18] Of course, urine and blood tests differ in some respects since the latter requires a physical penetration of the skin in order to secure the sample, whereas the former requires close observation of the person yielding the sample. That difference is not, however, material to the question whether reasonable expectations of privacy are invaded. *Cf. Katz* v. *United States*, 389 U.S. 347, 352-353 (1967) (rejecting the notion that lack of physical penetration is determinative of whether a search has been conducted). The Court in *Schmerber* minimized the significance of the intrusion beneath the skin; in fact the Court characterized that aspect of the procedure as involving "virtually no risk, trauma, or pain." 384 U.S. at 772. Instead, what was primarily at stake in *Schmerber* was the individual's reasonable expectation of privacy in his body fluids—that these would not be appropriated and analyzed by the government outside the constraints of the Fourth Amendment. The very same concerns, of course, exist in determining whether urine tests are "searches."

C. The Customs Service Has Made No Showing That It Should Be Permitted to Conduct Urine Searches of Its Employees Without Observing the Traditional Fourth Amendment Standard of Probable Cause.

The decision below radically departs from well-established Fourth Amendment law. Just last term in *O'Connor v. Ortega*, a case, like this one, arising in the public employment context, this Court reaffirmed that searches undertaken without probable cause are presumptively unreasonable. 107 S.Ct. at 1500, citing *Mancusi* v. *DeForte*, 392 U.S. 364, 370 (1968).[19] Although the Court in *O'Connor* applied a less stringent standard than probable cause to the employer's search of the employee's office and files, it emphasized that its departure from this presumptive requirement was justified only because the employer had searched the *place* of work, which is supplied by the employer for work-related purposes, as distinct from the person or personal possessions of the employee. 107 S.Ct. at 1497.

Probable cause is presumptively required under the Fourth Amendment because it provides essential safeguards for the individual against unnecessary invasions of personal privacy and security by the state.[20] Funda-

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[19] *See also, Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971); *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978); *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 312-313 (1978); *United States* v. *Chadwick*, 433 U.S. 1 (1977); *United States* v. *United States District Court*, 407 U.S. 297, 318 (1972); *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970); *Katz* v. *United States*, 389 U.S. at 357; *Camara* v. *Municipal Court*, 387 U.S. at 528-529; *Chapman* v. *United States*, 365 U.S. 610 (1961).

[20] The warrant is also presumptively required, to insure that the vital balance between individual privacy and governmental interest is properly struck in particular cases, as evaluated in advance by a neutral and detached magistrate before a search or seizure is effected. *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 322-323 (1978); *United States* v. *Chadwick*, 433 U.S. at 9; *United States* v. *U.S. District Court*, 407 U.S. at 316-317; *Coolidge* v. *New Hampshire*, 403 U.S. at 453. Should the Customs Service attempt to establish a pro-

mentally, the function of the probable cause requirement is to give society the assurance that the government will direct its intrusive activity toward those who are likely to be guilty, and to avoid random searching of those likely to be innocent. That assurance evaporates when the government undertakes a large-scale search program like the one at issue here, where 99.99+% of those searched have been innocent. That governmental searches are tolerated at all is because the probable cause requirement strikes a balance between the individual's right to privacy and security and the community's need for evidence. *Winston* v. *Lee*, 470 U.S. 753, 758 (1985); *Gerstein* v. *Pugh*, 420 U.S. 103, 112 (1975); *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). Where the government does not even expect to obtain evidence, the searches are intolerable.

Over the years, this Court has found it necessary to carve out a number of exceptions to traditional Fourth Amendment requirements in "'exceptional circumstances'," where "'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable'." *O'Connor* v. *Ortega*, 107 S.Ct. at 1500, quoting *New Jersey* v. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment).[21] However, the burden is always upon the government to justify such exceptions, and they must be "jealously and carefully drawn." *Arkansas* v. *Sanders*, 442 U.S. 753,

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gram that meets the probable cause requirement in the future, it would be free to attempt to show then that exigent circumstances make the warrant requirement impracticable. *But see*, Brief of the American Civil Liberties Union as *amicus curiae*. Until that time, this Court need not address the question whether a warrant is required for urine testing.

[21] *See also*, *Arizona* v. *Hicks*, 107 S. Ct. 1149, 1154 (1987) (seizure based upon less than probable cause can be justified where "operational necessities render it the only practicable means of detecting certain types of crime"); *Griffin* v. *Wisconsin*, 107 S. Ct. 3164, 3167 (1987) (special needs of the probation system render search on less than probable cause reasonable).

759-760 (1979); *Coolidge* v. *New Hampshire*, 403 U.S. at 455; *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967).

Lest the exception swallow the probable cause rule, this Court has permitted governmental searches without probable cause only where the intrusion into Fourth Amendment interests is relatively minor, and, even then, only where departure from the probable cause standard is an "operational necessity" for the vindication of an important government interest. The mere interest in making law enforcement easier, of course, does not constitute an "operational necessity" that justifies departure from "the textual and traditional standard of probable cause." *Arizona* v. *Hicks*, 107 S. Ct. 1149, 1154, 1155 (1987); *see also*, *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273-274 (1973).

In this case, the Customs Service claims the right to conduct most intrusive and personal searches of its employees without probable cause, purportedly to insure that those who occupy covered positions are not users of illegal drugs. The government would have the Court rule that if it can legitimately disqualify individuals from employment on the basis of illegal drug use, *on that basis alone*, it can search to find out whether the employee has used illegal drugs, and can require employees to give up their rights to absolute privacy in their excretory functions. Moreover, the government would have the Court permit this extraordinary intrusion to be imposed on an innocent population it admits it has no reason to suspect of illegal drug use, either individually or collectively. As we now demonstrate, the radical exception Customs seeks to the Fourth Amendment's presumptive requirements is not supported by this Court's decisions, including the Court's recent decision in *O'Connor*, permitting departure from the probable cause requirement only in certain limited circumstances.[22]

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[22] There can be no doubt that these searches are not consensual within the meaning of this Court's Fourth Amendment jurispru-

1. *Urine Tests Are Far More Invasive of Fourth Amendment Interests Than Any Search or Seizure This Court Has Found Reasonable on Less Than Probable Cause*

By any measure, the urine search is highly intrusive. We have described the offensive, embarrassing process the Customs employee must undergo in producing a urine sample for analysis. This process requires individuals to surrender significant components of the high degree of privacy all agree has traditionally accompanied the excretory functions.

Moreover, as the court of appeals recognized (Pet. App. 8a), even aside from the psychological intrusion of passing urine while under surveillance, and then surrendering it to a monitor for a physical inspection, the potential for the revelation of anatomical secrets hidden in urine is also offensive to reasonable privacy expectations. Urine is the repository of a wealth of information that may be discovered through chemical testing. Urine samples can disclose the existence of medical conditions, such as pregnancy, epilepsy, or diabetes, treatment of psychiatric disorders, use of contraceptives, or other personal information. Employees obviously do not expect that their employer will have the opportunity to discover these private and non job-related facts.[23]

Under the Customs program, the revelation of personal medical information is more than a mere possibility, it is a necessary byproduct of drug testing. By chemically analyzing employee urine samples, the government uncovers the use of controlled substances under prescription, and therefore makes itself privy to personal medical conditions that have no relation to the employee's work, and could not reasonably be inquired into under normal circumstances. In the Customs program, moreover, the employee is warned to reveal *all* medication taken, whether prescription or over-the-counter. An employee has no way of knowing whether the medication he or she is taking will trigger a positive result, and will inevitably decide (whether out of ignorance, anxiety, or both) to be over inclusive. *See* J.A. 55 (Aff. of Lee Cruz). Thus, although all but the screened-for drugs should be eliminated by the final test, far more extensive information will have been revealed, recorded, and reviewed by non-medical persons. This Court has recognized that individuals have a legitimate privacy interest in preventing undue disclosure of such intimate medical information. *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977).

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dence. True consent operates to waive one's right to object to warrantless search only where the government proves that the consent was "freely and voluntarily given," and not a product of coercion, either explicit or implicit. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222, 228-229 (1973). The urine tests Customs requires as a condition of employment are not consensual under the *Schneckloth* formulation, because the "consent" is coerced. Employees may refuse to submit to the test only under penalty of the denial of their promotions, and curtailment of career advancement at Customs.

Further, it is clear that if the urine testing program is otherwise unreasonable and illegal under the Fourth Amendment, as we argue, Customs may not condition receipt of government employment upon employees' waiver of their constitutional rights to be free of such unreasonable searches. "The theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967); *see also Lefkowitz* v. *Turley* 414 U.S. 70 (1973); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Garrity* v. *State of New Jersey*, 385 U.S. 493 (1967).

[23] The Customs program does not, of course, call for the testing of samples for pregnancy or psychiatric or other medical disorders. However, once the sample has been collected by the employer, the employee has no control over its uses. Indeed, recently, the District of Columbia police department was discovered to be surreptitiously testing the urine samples of its female police cadets for pregnancy, even though the samples were collected in conjunction with a drug testing program. *See* Churchville, *Applicants for D.C. Police Secretly Tested For Pregnancy*, Washington Post, November 5, 1987, A1, cols. 1&2.

Aside from revealing private medical conditions, urine tests also enable employers to monitor conduct of employees that occurs during their off-duty hours. The tests "provide government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home." *Jones* v. *McKenzie*, 833 F.2d 329, 339 (D.C. Cir. 1987), *petition for cert. filed*, No. 87-1706 (April 15, 1988). As described *supra*, urine tests cannot determine the time, dosage, or circumstances of drug use, and can be reported positive for days and on occasion weeks after a drug was used. While Customs employees do not assert any right to use illegal drugs off duty, or to commit a crime, it does not follow that their employer has the right to use any and all means to ferret out evidence of such misconduct. All employees, even those who work for the government, have the expectation that their lives outside the office are private, not to be the subject of extraordinary surveillance by their employer unless it becomes notorious or disreputable.

These intrusions are far greater than those this Court has permitted to be conducted without probable cause.[24]

[24] An exception to this general observation exists in highly unique, limited situations, where the individual's expectation of privacy is at its nadir, and the government's interest in detecting contraband is at its zenith. Thus, relatively intrusive and nonroutine searches have been permitted on the basis of reasonable suspicion rather than the more stringent probable cause requirement at the border, because historically "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is struck much more favorably to the government at the border." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 539 (1985). *See also, United States* v. *Ramsey*, 431 U.S. 606, 619 (1977) (noting that acceptance of routine border searches is "as old as the Fourth Amendment itself"). Intrusive personal searches at the border, it must be remembered, have not been permitted without at least individualized suspicion.

This Court has also upheld the right of prison authorities to conduct concededly intrusive searches of prison inmates without any individualized suspicion on the basis of the uniquely dangerous

In fact, this Court has permitted only minimally intrusive personal searches on less than probable cause, and even for minimal intrusion has almost always required that at least a reasonable suspicion standard be met. In *Terry* v. *Ohio*, for example, this Court held that police officers may briefly detain persons reasonably suspected of engaging in criminal activity and subject them to a pat down search for weapons upon reasonable suspicion that they are armed and dangerous. The Court explained that these relatively minimal intrusions were justified by the need for officers on the beat to take swift protective action on the basis of their on-the-spot observations. 392 U.S. at 20.[25] However, since *Terry*, this Court has repeatedly cautioned that more intrusive and full searches or seizures of a person, his automobile, or his effects, may not be conducted absent probable cause, even where similarly important governmental interests are at stake. *United States* v. *Place*, 462 U.S. 696, 709-710 (1983); *Florida* v. *Royer*, 460 U.S. 491, 500-501 (1983); *Dunaway* v. *New York*, 442 U.S. 200, 212-213 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 567 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882 (1975); *United States* v. *Ortiz*, 422 U.S. 891, 895-896 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. at 269-270.

nature of the prison environment and the obviously minimal privacy expectation of prison inmates. *Bell* v. *Wolfish*, 441 U.S. 520, 555-560 (1979); *see also Griffin* v. *Wisconsin*, 107 S.Ct. at 3171 (permitting searches of the homes of probationers where there are reasonable grounds for the search given assumption that such persons are in need of supervision and more likely than ordinary citizen to violate the law).

[25] The rationale that permits the warrantless *Terry* investigative stop and frisk, based upon reasonable suspicion, has since been applied in other analogous contexts, where there is a need for quick action by police officers and where the investigations themselves fall short of full scale searches or arrests. *E.g., United States* v. *Sharpe*, 470 U.S. 675 (1985); *United States* v. *Hensley*, 469 U.S. 221 (1985); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams* v. *Williams*, 407 U.S. 143 (1972).

The extraordinary invasion of the privacy and dignity of innocent employees occasioned by urine searches simply cannot be compared to a brief stop of persons suspected of committing crimes or of vehicles on the highway. Urine searches are also not reasonably comparable to those held legitimate upon less than probable cause in *O'Connor* v. *Ortega* and *New Jersey* v. *T.L.O.* Both cases, of course, involved individuals suspected of wrong-doing, and efforts by the governmental authorities to find evidence of that wrong-doing. The employer's office search in *O'Connor* represented a "'relatively limited invasion' of employee privacy" since offices are supplied by the government solely for work-related reasons and "employees may avoid exposing personal belongings at work simply by leaving them at home." *O'Connor*, 107 S.Ct. at 1502, *quoting Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967). Urine searches, on the other hand, are personal searches, not inspections of property provided by the government for a limited purpose, and the employee is powerless to render them less personal or degrading. *Cf. O'Connor*, 107 S. Ct. at 1497 (noting that the standard applied to searches of areas and items related to work and within the employer's control is not necessarily the same as the standard to be applied to more personal searches).

In *T.L.O.*, the Court upheld a high school principal's authority to conduct an examination of a student's purse upon reasonable suspicion that it contained evidence of an observed infraction of school rules. The Court acknowledged that the examination of a purse, even where reasonable suspicion exists, is a "substantial invasion of privacy," (469 U.S. at 337), but permitted it in view of the need to maintain order in the schools. The search of a student's purse seems almost trivial by comparison with urine searches. Incursions into the body itself, to explore what may be found there, are not "limited searches" and are unquestionably more intrusive and degrading than the search of one's handbag or briefcase. *Cf. T.L.O.*, 469

U.S. at 337 (noting that "even a limited search of the person is a substantial invasion of privacy"). This Court has observed that such quasi-medical hunts for evidence implicate "the most personal and deep rooted expectations of privacy." *Winston* v. *Lee*, 470 U.S. at 460, citing *Schmerber* v. *California*, 384 U.S. at 767-768. That is all the more true when, unlike the searches in *O'Connor* and *T.L.O.*, the government has no reason at all to suspect that its hunt will turn up evidence of misconduct.

Nor can personal urine searches be compared to statutorily authorized inspections of commercial property employed in a "closely regulated" industry, for which neither a warrant nor probable cause is required. *New York* v. *Burger*, 107 S. Ct. 2636 (1987) (junkyards); *Donovan* v. *Dewey*, 452 U.S. 594 (1981) (stone quarries); *United States* v. *Biswell*, 406 U.S. 371 (1972) (firearms dealers); *Colonnade Catering Corporation* v. *United States*, 397 U.S. 72 (1970) (liquor dealer). The decisions upholding these inspection plans depend upon the premise that a businessman has a reduced expectation of privacy in commercial property employed in an industry that has historically been subject to pervasive government regulation. *New York* v. *Burger*, 107 S. Ct. 2642-2643.[28]

It is one thing to recognize the reduced expectation of privacy of a businessman over the stock of a commercial enterprise. It is quite another to apply that reasoning to the high degree of privacy that has traditionally been afforded to one's person and bodily functions. This Court has never applied the commercial property *Colonnade-Biswell* rationale to personal searches, much less to highly intrusive ones. Indeed, it has cautioned that "[t]he clear import of our cases is that the closely regulated

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[28] As the Court stated in *Marshall* v. *Barlow's, Inc.*, "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist for the proprietor over the stock of such an enterprise." 436 U.S. at 313 (citations omitted).

industry of the type involved in *Colonnade* and *Biswell* is the exception", and not the rule. *Marshall* v. *Barlow's*, 436 U.S. at 313-314; *see also Donovan* v. *Dewey*, 452 U.S. at 589-599 (distinguishing commercial property subject to warrantless administrative searches, from private residences); *Camara* v. *Municipal Court*, 387 U.S. at 537 (permitting inspections of homes for code violations using area warrants, where inspections "are neither personal in nature nor aimed at discovery of evidence of crime)." It is simply unthinkable that this Court would equate the businessman's privacy interest in firearms, liquor, a stone quarry, or a junkyard, with the privacy interest of individuals in their bodies and bodily functions.

In short, the invasion of Fourth Amendment interests in privacy and dignity is far greater under the Customs program than under any other governmental search or seizure this Court has previously permitted to be conducted without probable cause (much less without reasonable suspicion). That intrusiveness, particularly when coupled with the absence of "operational necessities" to conduct the searches, to which we now turn, require adherence to the probable cause standard.

2. *No Operational Necessities Exist to Justify Departure From the Probable Cause Standard*

The government has utterly failed to show that it is in any sense operationally necessary to search its employees' urine without probable cause. It has not shown that it cannot obtain the information it needs in other ways,[27] nor has it argued that the probable cause standard would be difficult to apply in the Customs Service. Such arguments would be unavailing in any event.

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[27] Obviously, it cannot be operationally necessary to search without probable cause if it is unnecessary to search at all. We argue in the next section that the government has shown no need to undertake any urine searches for drugs because its workforce has had no discernible problem of drug abuse.

Customs has not demonstrated that a probable cause standard would prevent its investigating and punishing workplace wrongdoing.[28] The relationship between the Service and its employees is not a fleeting one, analogous to the spontaneous encounters between police officers and suspects in the street or drivers on the highway. Nor is Customs searching for information it cannot secure in other ways without significant compromise of the government's interests. As a number of courts faced with similar programs have recognized, the government "do[es] not have to rely on across the board drug tests to insure the integrity [of employees] . . . Information concerning drug problems can be acquired by physical observation . . ., citizen complaints, tips from other law enforcement agencies and other means." *Penny* v. *Kennedy*, 648 F.Supp. 815, 817 (S.D. Ga. 1986); *see also, Policemen's Benevolent Association* v. *Washington Township*, 672 F.Supp. 779, 793 (D.N.J. 1987); *Taylor* v. *O'Grady*, 669 F.Supp. 1422, 1438 (N.D. Ill. 1987); *Capua* v. *City of Plainfield*, 643 F.Supp. 1507, 1518 (D.N.J. 1976). Thus, Customs employees are subject to on-going observation by their supervisors and co-employees, and may be required to undergo a formal background investigation or other inquiry into their qualifications and integrity. The Service has ample opportunity to study individual employees, at its own pace, and to make reasoned judgments about

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[28] In *Terry* and its progeny, for example, limited intrusions into Fourth Amendment interests are permitted upon less than probable cause because waiting for reasonable suspicion to ripen into probable cause would pose insurmountable barriers to effective investigation or a danger to the officer on the street. 392 U.S. at 20. Similarly, in *Camara* v. *Municipal Court*, the Court ruled that building inspections could be conducted in the absence of probable cause in the traditional sense because such inspections are not personal in nature, and because their purpose is not to uncover evidence of wrongdoing but to insure compliance with minimum health and safety standards, whose violation might be unintentional and not observable by the occupant from within or by authorities from outside. 387 U.S. at 537.

their characters; indeed it has presumably already made positive judgments by selecting these employees for promotion.[29]

Nor is the government's interest in the search an immediate one that arises out of the need to correct acts of known misconduct in order to assure the agency's effective and efficient operation as in *O'Connor* v. *Ortega*, 107 S.Ct. at 1502. *See also T.L.O.*, 469 U.S. at 342-343 (probable cause standard would unduly burden school authorities in their efforts to maintain order). If there is any need to investigate further an employee already known and regarded as successful, Customs may take the time it needs to determine whether there is probable cause to believe that a tentative selectee is guilty of wrongdoing that should prejudice his or her employment, without any loss to its effectiveness or, more importantly, the public safety.

It should be noted here, lest Customs claim otherwise, that the authorities at the Customs Service are not novices in the application of the probable cause standard. *Cf. T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring). Unlike many government supervisors (*O'Connor*, 107 S.Ct. at 1502) those at the Customs Service, by virtue of the mission of their agency, understand well all "niceties" of the probable cause standard, as they apply it routinely

[29] We expect that the Customs Service will claim that in some cases it will be unable to detect drug use through other devices or to even obtain sufficient facts to give rise to probable cause. Obviously, the opportunity to investigate employees does not guarantee that *every* employee of questionable character will be detected (although the 200 year old Customs Service appears to be succeeding handsomely at hiring employees with high integrity). If the Fourth Amendment means anything, it means that requiring probable cause can conceivably result in a failure to detect wrongdoing in some circumstances. That fact, however, cannot be a basis for dispensing with the requirement entirely, at least for a search as intrusive as urine testing, where a single failure to detect does not have immediate consequences for the public safety.

in their investigative contact with the public.[30] Indeed, it is ironic that those who are the object of this search, Customs employees, are themselves schooled in such matters, and, perhaps for that reason, particularly sensitive to the government's attempt to dilute their constitutional rights.

In sum, Customs has failed to justify an exception to the probable cause requirement that would allow it to subject selectees to covered positions to the substantial invasion of personal privacy and dignity involved in urine testing. This Court should rule that Customs may require selectees to produce a urine sample for chemical analysis only where there is probable cause to believe that the urine search will reveal evidence of misconduct by an employee.

D. The Customs Program Violates the Fourth Amendment In That It Is Not Based On Any Suspicion, Either Individualized or Generalized, That It Will Reveal Evidence of Illegal Drug Use By Customs Employees.

1. *Customs' Intrusive Urine Searches May Not Be Conducted on Less Than Reasonable Individualized Suspicion.*

If the Court finds that operational necessities of the workplace justify relaxing the traditional Fourth Amendment requirement of probable cause, then the constitutionality of the Customs program must be measured by its "reasonableness" under all the circumstances. *O'Connor* v. *Ortega*, 107 S.Ct. at 1502-1503. In *O'Connor*, the Court reserved the question whether individualized suspicion was an essential element of the reasonableness standard applicable to the search of an employee's office and files, since such suspicion was in fact present in that

[30] This Court has elsewhere noted that the concept of probable cause is "practical and non-technical" and that laypersons are capable of judging the existence of probable cause. *Illinois* v. *Gates*, 462 U.S. 213, 231 (1983), *quoting Brinegar*, 338 U.S. at 176; *Shadwick* v. *City of Tampa*, 407 U.S. 345, 351-352 (1972).

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case. 107 S.Ct. at 1503, citing *T.L.O.*, 469 U.S. at 342, n.8.

Here, there is no such individualized suspicion, so that, if probable cause is not required the question reserved in *O'Connor* and *T.L.O.* is squarely presented. We submit that all of the factors that militate in favor of the probable cause requirement, when balanced under the "reasonableness" inquiry, dictate that these searches may not be undertaken on less than reasonable, individualized suspicion that they will reveal evidence that an employee is guilty of work-related misconduct (here, use of illegal drugs).

The intrusion upon personal privacy is clear and serious. Like the search of a handbag, briefcase, office, or desk, a urine search can reveal a wealth of very personal information, and it is more embarrassing, degrading, and offensive. Moreover, unlike the situation where reasonable suspicion exists, as in *O'Connor* and *T.L.O.*, here, large numbers of almost certainly innocent employees are personally searched. The privacy invasion thus increases exponentially. Even if Customs can demonstrate that its interests in securing a drug-free workforce would be unduly frustrated by a probable cause requirement, surely it cannot convincingly argue that a lower threshold standard of individualized suspicion would prove equally onerous in light of the serious privacy concerns at issue here.

Thus, this case would be like *O'Connor* if the employer there had gone from office to office, in a systematic way, searching for evidence of misconduct it had no reason to suspect existed, except that the searches there would have been less intrusive than those at issue here. It is difficult to imagine that the Court would find the reasonableness standard met where, as here, the search is highly intrusive and there is neither individualized *nor generalized* suspicion of wrongdoing.

The reasonableness inquiry requires the Court to determine whether the search is "justified at its inception,"

and whether it is "'reasonably related in scope to the circumstances which justified the interference in the first place'." *Id.*, *quoting Terry* v. *Ohio*, 392 U.S. at 20, and *T.L.O.*, 469 U.S. at 341. The more intrusive the search, the greater must be the government's justification.

It is plain that the Customs program of intrusive searches without any suspicion cannot withstand scrutiny. The urine tests are not justified at their inception because Customs conducts them without any reasonable belief that they will reveal any drug use. Further, the tests are not reasonably related in scope to Customs' objective—to prevent drug-using employees from assuming covered positions—because the undisputed evidence in this case establishes that other, less intrusive devices have already achieved that goal, without compromising employees' Fourth Amendment rights, while the intrusive program Customs would implement is wholly ineffective to either detect or deter illegal drug use.

2. *Urine Tests Are Not Justified at Their Inception Under the Customs Program, in that They Are Not Based on Any Belief that They Will Reveal Illegal Drug Use*

When Customs established its drug screening program, it admitted that it had no reason to suspect drug abuse among its employees, either individually or collectively, nor any reason to expect that it would uncover such use through urinalysis. The trial court found that Customs had not "demonstrated a drug problem among its work force," and noted the "conspicuous absence of any statistics by the defendant showing any drug problem whatsoever among federal workers." Pet. App. 58a-59a. Therefore, Customs has utterly failed to show "reasonable grounds for suspecting that the search [would] turn up evidence of work-related misconduct," so as to be "justified at its inception." *O'Connor* v. *Ortega*, 107 S. Ct. at 1503.

No one, least of all Customs employees themselves, would deny that Customs' stated objective for its plan is

an important one: to detect persons who use illegal drugs and deter them from assuming positions in which they will be involved in drug interdiction. As unexceptionable as this goal is, however, it possesses neither the immediacy nor the uniqueness that would be necessary were this Court to authorize, for the first time, intrusive, personal suspicionless searches. The government might and in fact has asserted the very same sort of interest in assuring that individuals occupying a host of government positions of trust do not engage in activities during their off duty time that are illegal, or that otherwise might subject them to compromise. These employees include not only those directly engaged in law enforcement, but a host of other employees such as attorneys, accountants, auditors, teachers, public officials, and judges.[31] In short, if this sort of important, but apparently unthreatened government interest can justify subjecting Customs employees to urine tests without any suspicion at all to believe the tests will reveal evidence of illegal drug use, then it would be similarly constitutional to impose urine searches on any federal employee occupying a position of trust and responsibility.

Individualized suspicion, like the probable cause requirement generally, helps focus the most intrusive measures against the most likely guilty. Thus, only the most minimal interferences with Fourth Amendment interests, none of which could arguably be compared with urine searches, have been permitted in the absence of individ-

[31] In fact, in Executive Order 12564, the President has asserted that any illegal drug use, by *any* federal employee is "inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public." 51 Fed. Reg. 32889 (September 17, 1986). In accordance with that finding, the Executive Order authorizes the random testing of any employee who occupies one of the broadly defined "sensitive" positions, the testing of an applicant for *any* federal position, and the testing of *any* federal employee, with production of urine samples under *direct* observation, where there is reasonable suspicion that the employee has used an illegal drug, whether on or off duty. Section 3, E.O. 12564, 51 Fed. Reg. at 32890.

ualized suspicion. *E.g.*, *United States* v. *Martinez-Fuerte* (brief stops of automobiles on highways near the international border to question occupants, but *not* to search); *Colonnade Catering Corporation*, *supra*; *Biswell*, *supra*; *Donovan* v. *Dewey*, *supra* (administrative inspections of commercial premises used in a closely-regulated industry); *Camara*, *supra* (administrative inspections pursuant to area warrants to determine compliance with housing code).[32]

The rationale of *Martinez-Fuerte*, *Colonnade Catering*, and the other cases—that minimally intrusive and clearly necessary searches are reasonable where the vice of unbridled discretion is absent—inevitably breaks down when the searches themselves become more intrusive, and when the government interests thought to justify them are not proven and weighty. This extraordinary exception to the requirement of at least individualized suspicion must be closely guarded, and must not be extended to cases where the intrusion into personal privacy is anything more than insignificant, lest more and more intrusive searches be undertaken against more and more in-

[32] This general rule—that only the most minimal intrusions are permitted without individualized suspicion—has two exceptions, neither of which is applicable here, and both of which permit searches of persons or property already lawfully seized and in police custody. The first is the historically based exception that permits the police to conduct a search incident to a valid arrest of the arrestee and any areas within his immediate control, in order to protect the officer and prevent destruction of evidence. *Chimel* v. *California*, 395 U.S. 752 (1969); *Carroll* v. *United States*, 267 U.S. 132, 158 (1925); *Weeks* v. *United States*, 232 U.S. 383, 392 (1914). The second exception is the so-called "inventory search," which is a non-investigatory "routine administrative caretaking function." *South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5 (1976). This exception permits the police to search the contents of automobiles and other property that has been lawfully seized in order to secure and protect the property while it is in police custody. *Colorado* v. *Bertine*, 107 S.Ct. 738, 741 (1987); *Illinois* v. *Lafayette*, 462 U.S. 640 (1983); *South Dakota* v. *Opperman*, 328 U.S. at 375-377.

nocent persons, thus returning society to the state that demanded the Fourth Amendment in the first place.

Contrary to the view of the lower court (Pet. App. 11a-12a), the notice and lack of discretion present under the Customs program do not particularly enhance its reasonableness, or make it comparable to the extremely limited intrusions this Court and some lower courts have permitted in the absence of any individualized suspicion. Notice and lack of discretion may be the factors that clinch the reasonableness of a relatively minor and demonstrably necessary invasion of privacy, such as a fixed checkpoint automobile stop, or submission to magnetometer procedures at airports or in public buildings.[33] However, these factors have little significance when the search procedure itself is especially invasive. *Cf. United States* v. *Ortiz*, 422 U.S. at 895 (noting that the greater regularity attending checkpoint search of cars "does not mitigate the invasion of privacy that a search entails").[34]

As we have noted, the fact that no suspicion exists makes it certain that many more innocent than guilty employees will be subjected to the search, thereby making the procedure both more intrusive and less effective.[35] Similarly, as we explore further below, the notice factor dramatically diminishes any value the Customs program could have in detecting or deterring drug using employees from attaining covered positions.

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[33] *United States* v. *Martinez-Fuerte*; *McMorris* v. *Alioto*, 567 F.2d 897 (9th Cir. 1978); *United States* v. *Bell*, 464 F.2d 667 (2d Cir.), 409 U.S. 991 (1972).

[34] It could hardly be argued, for example, that if the government posted a sign at every federal building warning visitors that each and everyone of them would be subject to a frisk as a condition of entry, that would render the search procedure less intrusive or more reasonable.

[35] *Cf. Delaware* v. *Prouse*, 440 U.S. 648, 659-660 (1979) (noting that the practice of randomly stopping drivers for license checks is "ineffective means of promoting highway safety" because the number of licensed drivers that must be stopped in order to find one unlicensed one "will be large indeed").

Customs has never attempted to show any pressing or immediate need to conduct dragnet searches. It has utterly failed to demonstrate either that its objective of obtaining a "drug-free" workforce was ever in jeopardy, or that requiring individualized suspicion of drug use as a prerequisite to ordering a urine test would pose a significant obstacle to its accomplishment. Customs' claimed authority to conduct dragnet drug testing in the absence of these elements would therefore require this Court to expand radically the previously limited category of cases in which broad search programs are permissible.

In *United States* v. *Martinez-Fuerte*, for example, the Court upheld the authority of the Border Patrol to stop automobiles, but only to briefly question occupants about their citizenship, at fixed checkpoints near the international border with Mexico. In addition to observing the extremely limited nature of these intrusions, particularly given their proximity to the international border (428 U.S. at 558-560), the Court noted that the need to make such fixed checkpoint stops was great: the government had presented evidence that there were between 10 and 12 million illegal aliens in the country, that 85% of these were from Mexico, that because of the 200 mile border surreptitious entry was relatively easy, and that traffic checkpoints had been extremely effective in detecting illegal aliens. 428 U.S. at 551-554; *see also United States* v. *Brignoni-Ponce*, 422 U.S. at 878-879; *Almeida-Sanchez* v. *United States*, 413 U.S. at 276-277 (Powell, J., concurring). Furthermore, the Court was convinced that a requirement that stops be based upon reasonable suspicion would be impracticable to address the demonstrated problem because the heavy flow of traffic on major inland routes made particularized study of a given car impossible.[36]

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[36] *Cf. Delaware* v. *Prouse*, 440 U.S. at 662 (suggesting in dicta that roadblock stops to detect safety violations or intoxicated drivers might be reasonable). Unlike the highway situation, where close observation sufficient to permit a reasonable suspicion or

Customs' generalized interest in a "drug-free" workforce stands in stark contrast to the government's pressing need to stem the tide of illegal entry into the United States that was not only articulated, but was established in *Martinez-Fuerte*. In this case, Customs had no reasonable grounds to believe the tests would reveal any significant drug use by Customs employees when it implemented the program, and its experience under the program confirms that it has no such reasonable ground now, almost two years later. The Commissioner himself has pronounced his own belief that the present work force is "largely drug-free" (J.A. 10), has conceded that "the extent of illegal drug use by Customs employees was not the reason for establishing this program" (*id.* at 15), and has assured employees that he "hope[s] and expect[s] to receive reports of very few positive findings through drug screening." *Id.* These statements are more than mere platitudes; Customs has offered no evidence of illegal drug use by current employees, its experience under the testing program confirms there is no such use, and it has offered no reason why illegal drug use will be a problem in the future that cannot be handled through the traditional employment devices that have always worked in the past. Surely, it should not be permitted to argue that such use is occurring in some significant way, entirely undetected, and then allowed to use that unsupported contention to justify searching employees for evidence of illegal drug use.[37]

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probable cause standard is not possible, here, the supervisors have close and constant contact with employees, making it entirely possible to operate on an individualized suspicion standard.

[37] References to the extent of illegal drug use in society at large cannot suffice to establish reasonable grounds to believe that drug use will be found among current Customs employees, particularly those who have competed and been selected to receive promotions. It is obviously inappropriate to resort to national statistics to establish a justification for searching a particular group, at least where that group has chosen a career in law enforcement and

In sum, permitting the government to subject large numbers of persons to intrusive searches without regard to individualized suspicion, and without demonstrating any immediate need to undertake such searches cannot be justified under the decisions of this Court. A search based on no suspicion at all is an extreme measure that should be reserved to the most pressing circumstances and the most limited intrusions. On the facts of this case, the Customs Service has failed to justify the radical dilution of the Fourth Amendment rights of its employees that it seeks.

3. *Customs' Program Is Not Reasonably Related in Scope to its Stated Objectives Because It Has Other Less Intrusive Means to Address the Stated Problem, While the Program Itself Is Ineffective to Do So*

In those cases where this Court has permitted searches to be conducted without any individualized suspicion, it has done so only because "the balance of interests precludes insistence upon 'some quantum of individualized suspicion'." *Delaware* v. *Prouse*, 440 U.S. at 654, quoting *Martinez-Fuerte*, 428 U.S. at 560. As we have noted, Customs has never attempted to show that it can-

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already has an established track record to the contrary. This is particularly true since all parties agree that if there were a significant drug problem at the Customs Service, it would manifest itself in decreased productivity, increased absenteeism, increased accidents, or some other objective phenomenon. *See* J.A. 110-111.

Moreover, the drug problem in society is not a new one that should cause the Customs Service to question the efficacy of existing methods for detecting or deterring the employment of drug users. While the extent of illegal drug use in our society has appropriately received increased attention in recent years as a serious law enforcement problem, for the most part, the number of users is declining. *See* National Institute on Drug Abuse, "Highlights of the 1985 Household Survey on Drug Abuse" (Nov. 1986), pp. 2-4. There is no evidence that the street drug problem has a parallel in the federal workforce. We urge the Court to reject the government's likely invitation to justify this intrusion into Fourth Amendment interests on the basis of an assortment of largely meaningless statistics concerning the extent of drug use in society.

not achieve its goal if it is required to possess individualized suspicion of illegal drug use before imposing a drug test on its employees. Indeed, it seems to admit that it has achieved its goal heretofore without any drug testing at all, entirely consistently with traditional Fourth Amendment means. It must not be permitted to rest on unsupported assertions that those traditional employment devices are no longer sufficient to secure a drug-free workforce.

Moreover, Customs has no reasonable grounds to believe the testing program will reveal evidence of employee misconduct or prevent drug using employees from entering covered positions, because the program, as Judge Hill recognized in dissent below (Pet. App. 26a-27a), is entirely ineffective to meet these goals. As this Court observed in *Delaware* v. *Prouse*, in order to withstand constitutional scrutiny, a search must be in service of an important governmental interest and must be a "sufficiently productive mechanism to justify [its] intrusion upon Fourth Amendment interests." 440 U.S. at 658-59; *see*, *T.L.O.*, 469 U.S. at 337 (individual privacy expectations must be balanced against "the government's need for *effective* methods to deal with breaches of public order") (emphasis added); *Schmerber*, 384 U.S. at 771 (noting that blood test is a "highly effective" means of determining level of intoxication).

The Customs drug testing program is not a "productive mechanism." The undisputed expert testimony plaintiffs supplied in this case established that virtually anyone who uses illegal drugs can avoid detection by temporary abstinence or, for more sophisticated drug users, by adulterating their samples. J.A. 60-61; 66; 70. On-the-job observation, background investigations, and urine tests conducted without notice, but with probable cause, are patently more effective and reliable than a urine test that can be frustrated at the subject's option.

Clearly, a search that can so easily be thwarted will not serve as an effective deterrent to prevent illegal drug

users from seeking Customs positions (even assuming they would be interested in doing so). It simply defies common sense to assert that such individuals, who are not deterred from seeking covered positions by a thorough background investigation, or the knowledge that performance will be closely scrutinized and illegal drug use will result in their dismissal, would be deterred by an ineffective one-time urine test. *Cf. Delaware* v. *Prouse*, 440 U.S. at 659.[38]

Of course, because the Customs Service seeks to both justify its program as a deterrent and implement it without any evidence that there is a problem to deter, the actual ineffectiveness of the Customs program can never be accurately measured, but only assumed. We do know that only an infinitesimal number of positive results have been recorded, among thousands of individuals tested. We would argue that this provides proof either that additional detection devices are unnecessary or that the drug tests are ineffective. The government, however, will argue that the low level of positive results demonstrates the program is a deterrent. Neither hypothesis can ever be proven empirically. By implementing its intrusive program without any clear indication of its necessity, the government is in the enviable position of

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[38] The lower court's observations (Pet. App. 18a) that addicts may not be able to abstain and that employees may not be aware of the "fade-away effect" are frivolous. Customs does not need a urine testing program to uncover the addicts in its midst; assuming such addicts exist among current employees, it seems most unlikely (as the unrebutted expert testimony indicated) that addicts would both escape detection through observation, and also then be selected to receive promotions. *See* J.A. 61. Further, it is naive to assume that the determined casual drug user will not become aware quickly that he or she need only engage in a brief period of abstinence upon applying for a covered position, in order to escape detection. Even without that awareness, any user who could, that is, all but the most confirmed addict, would surely abstain from use when told that the position for which he or she has applied requires a drug test. That five-day minimum abstention period would, in virtually every case, result in a clean urine sample.

being able to claim success whether or not it ever catches or deters anyone.

To summarize, the government's proffered justification for imposing this urine testing plan—the need for further assurances that Customs employees in covered positions do not use illegal drugs—is neither established in this case, nor served by the Customs program. This abstract and unproven justification may not serve as the basis for invading the privacy and dignity of thousands of Customs employees who, ironically, only seek the opportunity to serve their country in its battle against the traffic in illegal drugs.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

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OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION, ET AL., PETITIONERS

v.

WILLIAM VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether under the Fourth Amendment the Customs Service may require all employees applying for a transfer to any position involving the interdiction of narcotics, the carrying of firearms, or the handling of classified material, to undergo a urinalysis drug test as a condition of obtaining such a position.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1879

NATIONAL TREASURY EMPLOYEES UNION, ET AL., PETITIONERS

v.

WILLIAM VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 816 F.2d 170. The opinion of the court of appeals on the government's motion for a stay pending appeal (Pet. App. 29a-39a) is reported at 808 F.2d 1057. The opinion of the district court (Pet. App. 40a-60a) is reported at 649 F. Supp. 380.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1987. The petition for a writ of certiorari was filed on May 27, 1987, and was granted on February 29, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A. The Customs Service Drug-Testing Program

1. The Customs Service, a bureau of the Department of the Treasury, is "the nation's primary border enforcement agency"

and "is charged with the responsibility for interdicting illegal drugs that enter the country" (J.A. 109). In fiscal year 1987 alone, Customs agents made over 18,000 narcotics and dangerous drug seizures, representing drugs with a retail value of nearly 9 billion dollars. *Customs USA, Fiscal Year 1987*, at 40. Recognizing the surge in drug trafficking in the last several years, "Congress recently responded in a manner not unlike a response to a military threat, appropriating over $1 billion (an increase of 26.4% from the last fiscal year) to the Customs Service for fiscal year 1987 with funding for 1000 additional Customs Service personnel" (Pet. App. 35a).

In carrying out their mission, Customs employees intercept smugglers (see, *e.g.*, 19 U.S.C. 482, 1581; *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 582-583 (1983); *United States* v. *McMurray*, 747 F.2d 1417, 1419 (11th Cir. 1984)), perform surveillance (see, *e.g.*, *United States* v. *Johns*, 469 U.S. 478, 480 (1985); *United States* v. *Caicedo-Guarnizo*, 723 F.2d 1420, 1421 (9th Cir. 1984); *United States* v. *Porter*, 701 F.2d 1158, 1160 (6th Cir.), cert. denied, 464 U.S. 1007 (1983)), operate sophisticated equipment (see, *e.g.*, *United States* v. *Carter*, 760 F.2d 1568, 1571-1572 (11th Cir. 1985); *Porter*, 701 F.2d at 1160; *United States* v. *Lueck*, 678 F.2d 895, 896-897 (11th Cir. 1982)), execute searches and seizures (see, *e.g.*, 19 U.S.C. (& Supp. IV) 482, 1594, 1595; *Villamonte-Marquez*, 462 U.S. at 583; *Carter*, 760 F.2d at 1572-1573; *United States* v. *Sarda-Villa*, 760 F.2d 1232, 1235 (11th Cir. 1985)), interrogate suspects (see, *e.g.*, *McMurray*, 747 F.2d at 1419; *United States* v. *Vega-Barvo*, 729 F.2d 1341, 1343 (11th Cir.), cert. denied, 469 U.S. 1088 (1984); *United States* v. *Gomez-Diaz*, 712 F.2d 949 (5th Cir. 1983), cert. denied, 464 U.S. 1051 (1984)), make arrests (see, *e.g.*, 19 U.S.C. (& Supp. IV) 1589; *Johns*, 469 U.S. at 481; *Villamonte-Marquez*, 462 U.S. at 583), perform undercover work (see, *e.g.*, 19 U.S.C. (& Supp. IV) 2081; *United States* v. *Hall*, 739 F.2d 96, 98-99 (2d Cir. 1984)), apply force where necessary (see, *e.g.*, 19 U.S.C. 1581(a); *Villamonte-Marquez*, 462 U.S. at 580), gather and make use of classified information (*United States* v. *Mitchell*, 812 F.2d 1250, 1252 (9th Cir. 1987); *United States* v. *Sanders*, 663 F.2d 1, 1-2 (2d Cir. 1981)), and testify in trials and other public proceedings (see, *e.g.*, *Gomez-Diaz*, 712 F.2d at 951). Throughout that process,

"Customs employees are routinely exposed to actual illegal substances and confidential information relating to drug enforcement" (J.A. 109). Drug smuggling is also a violent business, and as a result "many Customs employees are required to carry and use firearms in connection with their official duties" (*ibid.*). "During 1986 alone, Customs Officers were the victims of assault on 32 occasions, and were shot at on 15 different occasions. Since 1974, nine officers have died in the line of duty." J.A. 110.

2. In December 1985, recognizing that the Customs Service's "primary enforcement mission is drug interdiction" (J.A. 10), respondent, the Commissioner of Customs, established a Drug Screening Task Force "to research all facets of drug screening" and "to determine its applicable use within Customs" (J.A. 11). After several months of study, during which the Task Force engaged in extensive research and consulted with experts in the field, the Commissioner reported that the Service was considering the implementation of a drug screening program within Customs (J.A. 10-12). The Commissioner explained (J.A. 10) that "there is no room in the Customs Service for those who break the laws prohibiting the possession and use of illegal drugs." And while the Commission "believe[d] that Customs is largely drug-free" (*ibid.*), he noted that "unfortunately no segment of society is immune to the threat of illegal drug use."

On May 8, 1986, the Commissioner announced the implementation of the Customs Service drug-testing program (J.A. 15-19). He explained that drug tests would be made "a condition of placement/employment" for positions that meet "one or more of the following criteria: direct involvement in drug interdiction and enforcement of related laws; a requirement that the incumbent carry firearms; or, a requirement for the incumbent to handle classified material" (J.A. 17, 19). The Commissioner also stated (J.A. 19) that a refusal to take the test would "only result in a loss of consideration for the position."[1]

[1] Under the Customs program, an employee who is tentatively selected for a covered position, but who refuses to take a drug test, will lose consideration only for the position for which he has applied. Subsequent applications are not affected by a refusal, nor does the Service maintain any documentation that adversely affects an employee's subsequent applications. J.A. 36.

In selecting the three categories of positions for which drug testing would be required, the Commissioner found (J.A. 113) that employees involved in drug interdiction "are often placed in difficult, dangerous situations where the success of the mission, their own life, and the lives of co-workers depend[ ] upon their ability to think and react clearly and quickly." The use of narcotics, he stated (*ibid.*), "dulls the ability to think and react quickly, clouding the employee's judgment and endangering other lives and government property." [2] In addition, the Commissioner found (*ibid.*) that "[p]ublic safety demands that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free. There is no reason why the public must bear the risk that public officials authorized to employ deadly force may be suffering from impaired perception and judgment." Finally, the Commissioner determined (J.A. 114) that employees who use illegal drugs and who are given access to classified material "may be bribed into disclosing such information to a criminal drug enterprise, and they may have a financial need to exchange information valuable to smugglers in order to support their habit." [3]

3. On August 4, 1986, following negotiations with petitioner National Treasury Employees Union (see J.A. 6, 45-51), the Commissioner issued Directive No. 51250-02, embodying the terms and conditions of the Customs Service drug-testing program (J.A. 23-44). Subsequently, on April 11, 1988, in compliance with recently enacted legislation (Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, § 503, 101 Stat. 468-471), the Department of Health and Human Services (HHS) issued detailed regulations governing all federal employee drug-testing programs. See *Mandatory Guidelines for Federal*

[2] The Commissioner also noted (J.A. 113) that "the liberties of other citizens are often dependent on the good judgment of these Customs employees who have the full range of police powers."

[3] The Commissioner stated (J.A. 114) that "[g]iven the incredible sums of money involved, it is not surprising that Customs Officers have been the targets of bribery by drug smugglers on numerous occasions, and several Customs officers have been removed for accepting such bribes and other integrity violations in past years."

Workplace Drug Testing Programs, 53 Fed. Reg. 11979 (1988) [hereinafter HHS Reg.]. Although those regulations are substantially similar to the Customs Directive, there are some respects in which the regulations add to, or differ from, the procedures set out in the Directive. In compliance with the federal statute (§ 503(b)(2)(B), 101 Stat. 470), the Customs Service will shortly be amending its Directive to incorporate the terms of the HHS regulations. As supplemented (and, to a limited extent, supplanted) by the HHS regulations,[4] the Customs drug-testing program operates in the following way:

a. After an employee qualifies for a position covered by the Customs program, the Service advises him by letter (see J.A. 81-85) of his tentative selection (J.A. 26). In that letter, the Service emphasizes that final selection for the job "is contingent upon successful completion of drug screening through urinalysis (and any other pre-employment/placement conditions such as medical examination [and] background investigation * * *)" (J.A. 26-27).

On an arranged date, the employee is met by a sample collector (an independent contractor) and presents a photo identification (J.A. 28; HHS Reg. § 2.2(f)(2)). The employee may list on a designated pre-test form any medications taken within the last 30 days and explain any circumstances under which he may have been in legitimate contact with illegal substances within the last 30 days (J.A. 29, 86-87). Provision of this information is voluntary (J.A. 87).[5] On the same form, the employee must also

[4] Although the HHS regulations were issued after the decision of the court of appeals, they are properly before this Court for review, to whatever extent they supplement or supplant the Customs Directive. As the Court made clear in *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21 (1974), this Court "must examine the * * * regulations as they now exist" – not as they "existed when the District Court [or the court of appeals] ruled in the case" (*id.* at 53). See *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 282 (1969). This principle is particularly applicable where, as here, a plaintiff seeks to enjoin a regulatory scheme that has been amended by the newly-issued regulations.

[5] The pre-test form presently states that "[f]ailure to provide this information may prevent the agency from considering the effect of medications taken by an individual on a positive test result" (J.A. 87). This language is, however,

indicate, by his signature, that he understands that successful completion of the drug test is a condition of employment; that if the results of the test indicate use of illegal drugs, he may lose consideration for the position applied for and, if he is already a Customs employee, may be subject to removal from the Service; and that if he refuses to take the test, he will lose consideration for the position applied for (J.A. 29, 86).[6]

b. When the actual testing takes place, the employee is asked to remove his outer garments (such as coats and jackets) and to leave all personal belongings, other than a wallet, with the outer garments (J.A. 29; HHS Reg. § 2.2(f)(4)). Observation is "close" but not "direct" (J.A. 29): the employee may provide his specimen in the privacy of a stall (HHS Reg. § 2.2(f)(7)), and the Service has carefully instructed its contractors to obey that restriction (J.A. 96-97).[7]

After the urine specimen is collected, the employee hands it to the collector, who measures the temperature of the urine to be sure that it has not been adulterated and that there has been no substitution for the employee's own urine (HHS Reg. § 2.2(f)(12)). The collector then places a tamper-proof custody seal over the top and down the sides of the bottle. In addition, a urine identification label is completed and placed around the bottle,

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inconsistent with the subsequently-issued HHS regulations, which provide that the Medical Review Officer (see pp. 8-9, *infra*) "shall review all medical records made available by the tested individual when a confirmed positive test could have resulted from legally prescribed medication" (HHS Reg. § 2.7(b)). Customs plans to delete the inconsistent language from its pre-test form, as part of the revisions necessary to conform to the HHS regulations.

[6] Test results may not be used for purposes of a criminal prosecution. By statute, the test results may not be disclosed to anyone without the employee's prior written consent, except to certain specified officials within the agency or by court order when necessary to defend against any challenge to adverse personnel action. Pub. L. 100-71, § 503(e), 101 Stat. 471. The purpose of that provision was "to avoid misuse and the possibility of criminal prosecution or any adverse action by any other agency or individual" (133 Cong. Rec. H5680 (daily ed. June 27, 1987) (statement of conferees)).

[7] Indeed, Customs insisted that a drug-testing proposal submitted by a contractor be modified to preclude direct observation of the voiding process (J.A. 91-92).

indicating the date and the individual's specimen number. The employee then signs a chain-of-custody form, which is initialed by the collector, and the urine specimen is placed in a plastic bag, sealed tightly, and submitted to a laboratory. J.A. 30-31; HHS Reg. § 2.2(f)(19), (20), (24), (25), (g), and (h).

Next, the employee's pre-test form is placed in a sealed envelope bearing the employee's social security number and is sent to a Customs Drug Screening Coordinator. That envelope is not opened unless and until there has been a positive finding on the drug test. If the test proves negative, the envelope and its contents are destroyed. J.A. 30-31.

c. The laboratory to which the samples are submitted must be managed by an individual who is either certified as a laboratory director in forensic or clinical laboratory toxicology, or who has a Ph.D. in one of the natural sciences, or who has training and experience comparable to a Ph.D. in one of the natural sciences (HHS Reg. § 2.3(a)(1) and (2)). This individual must also have direct experience in "analysis of biological materials for drugs of abuse" (*id.* § 2.3(a)(2)(iv)). The laboratories must maintain a security system (*id.* § 2.4(a)(1)) and follow detailed chain-of-custody procedures (*id.* § 2.4(a)(2)). The Secretary of HHS, as well as the Customs Service itself, has the right to inspect the laboratory at any time (*id.* § 2.4(a)(1)), and the laboratory must maintain and make available, for at least two years, documents on all aspects of the testing process (*id.* 2.4(m)). In addition, the regulations set forth elaborate quality assurance and control procedures (*id.* § 2.5), including thorough use of blind samples (*id.* § 2.5(d)).[8] They also

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[8] To be certified to perform drug-testing for federal agencies, a laboratory is subjected to a performance test, requiring it to test three cycles of blind samples over a period of at least three months (HHS Reg. §§ 3.17, 3.18). A single false positive result during this initial performance assessment "will automatically disqualify a laboratory from further consideration" (*id.* § 3.19(a)(1)). During the first 90 days following the certification of a laboratory, the agency must submit to the lab "blind performance test specimens * * * in the amount of at least 50 percent of the total number of samples submitted (up to a maximum of 500 samples) and thereafter a minimum of 10 percent of all samples (to a maximum of 250) submitted per

prescribe standards for laboratory filing systems (*id.* § 2.3(f)), training (*id.* § 2.3(e)), refrigerated storage of specimens (*id.* § 2.4(c) and (h)), and reporting of results (*id.* § 2.4(g)).*

Once the samples are submitted to the laboratory, they are analyzed for the presence of marijuana (cannabinoids), cocaine, opiates, amphetamines, and phencyclidine (J.A. 32). "In response to concern that specimens may be misused to test for physiological states other than drug abuse (e.g., pregnancy)" (53 Fed. Reg. 11975 (1988)), HHS Reg. § 2.1(c) expressly provides that urine specimens "shall be used only to test for those drugs included in agency drug-free workplace plans and may not be used to conduct any other analysis or test unless otherwise authorized by law." Two tests are conducted on the samples. There is an initial screening test that uses the enzyme-multiplied-immunoassay technique (EMIT) (J.A. 32; HHS Reg. § 2.4(e)(1)). Any specimen that is identified as positive on the initial test must then be confirmed using gas chromatography/mass spectrometry (GC/MS) (J.A. 32; HHS Reg. § 2.4(f)(1)). No sample is considered to be positive unless it is positive on the GC/MS test (HHS Reg. § 2.4(g)(2)). It is generally conceded that a properly conducted GC/MS test is essentially 100 percent accurate in detecting for the presence of drug residues in urine. See J.A. 62 (affidavit of John P. Morgan, M.D.); J.A. 65 (affidavit of Dr. Arthur J. McBay); J.A. 105 (declaration of Walter F. Vogl). Indeed, "[b]oth parties agree that GC/MS provides a highly accurate test for the presence of drugs, assuming proper handling, storage, and testing techniques" (Pet. App. 5a).

d. After the samples have been analyzed, the laboratory reports its results to a "Medical Review Officer," who must be

quarter" (*id.* § 2.5(d)(2)). After certification, laboratories must continue to be "challenged" every other month with a set of at least ten specimens (*id.* § 3.17(c)).

* Before the HHS regulations were proposed, Customs entered into a contract with a private laboratory and has requested a waiver from HHS to continue using that laboratory pending its certification under the guidelines. Customs' laboratory is on the HHS schedule for certification and Customs has no reason to believe that it will not be certified.

"[a] licensed physician * * * who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information" (HHS Reg. §§ 1.2, 2.4(g)). The Medical Review Officer must "review and interpret positive test results" before any such results may be transmitted to the agency (*id.* § 2.7(a) and (b)). The Medical Review Officer must examine "alternate medical explanations for any positive test result"; in doing so, he may interview the employee, review the employee's medical records, or consider other biomedical factors (*id.* § 2.7(b)). Before verifying a positive test result, the Medical Review Officer must offer the employee an opportunity to discuss the result (*id.* § 2.7(c)). The Medical Review Officer may also order a reanalysis of the original sample "[s]hould any question arise as to the accuracy or validity of a positive test result" (*id.* § 2.7(e)). After verifying the positive result, the Medical Review Officer transmits it to the agency.

e. If there is no legitimate explanation of the positive test result, Customs employees are subject to loss of consideration for the position sought, as well as possible removal from the Service (J.A. 35).[10] The test results, however, may not be turned over to any other agency, including criminal prosecutors, without the employee's prior written consent. See n.6, *supra*.

B. The Present Controversy

1. On August 12, 1986, petitioners—a federal employees' union and a union officer—brought this action in the United States District Court for the Eastern District of Louisiana, alleging that the Customs Service drug-testing program violated the Fourth Amendment (J.A. 3-9). Petitioners asserted that the collection of urine samples is a "search" within the meaning of the Fourth Amendment (J.A. 7) and that it is unreasonable "because there is no evidence of significant use of illegal drugs

[10] A Customs employee who does not wish to challenge a positive finding may voluntarily resign (J.A. 36).

amongst Customs employees, because the procedure will not identify those employees who do not use illegal drugs, because the tests will result in false positive readings, and because the tests are invasive and will be administered without any particularized suspicion" (J.A. 8).[11]

The district court held the Customs Service program unconstitutional on numerous grounds (Pet. App. 40a-60a). The court first found that the drug-testing program deprived job applicants of their Fourth Amendment right to be free from unreasonable searches and seizures, in that it uses "a dragnet approach of testing all workers who seek promotion into so-called 'covered positions' " (*id.* at 51a). Although the court agreed that the Service sought to accomplish a "legitimate" goal, it concluded that "the massive intrusive effect of the drug testing plan" outweighed the governmental interests (*ibid.*). The court next found (*id.* at 54a-55a) that the Customs program violated employees' Fifth Amendment privilege against self-incrimination, explaining (*id.* at 55a) that the tests "constitute[ ] a degrading procedure that so detracts from human dignity and self respect that it 'shocks the conscience' and offends th[e] Court's sense of justice." The court also held (*id.* at 55a-56a) that the drug-testing program violates employees' "penumbral" right of privacy and that it is "so fraught with dangers of false positive readings as to deny the Customs workers due process of law" (*id.* at 58a). The court enjoined the drug-testing program, forbidding the Customs Service to require drug tests of any applicants for the covered positions (*id.* at 61a-62a).

3. The court of appeals reversed (Pet. App. 1a-27a).[12] The

[11] Petitioners did not allege, as they do now (Br. 25-37), that the Fourth Amendment forbids drug testing except where there is a showing of probable cause. Indeed, in the court of appeals petitioners "concede[d] that the Customs Service might test employees who seek transfers if there were some degree of individualized suspicion" (Pet. App. 10a-11a). See also Appellees' Br. 13.

[12] The court addressed petitioners' constitutional challenges only insofar as the drug-testing program applies to current Customs Service employees who seek covered positions; it reversed the district court's judgment as applied to outside job applicants because those persons were not parties to the case (Pet. App. 3a, 21a; Pet. 6 n.9).

court noted that petitioners did not seek to defend the district court's judgment on privacy-rights grounds (*id.* at 20a). It also had no difficulty rejecting the claims that the drug-testing program involves compelled self-incrimination (*id.* at 19a-20a) and that it is so unreliable as to violate due process (*id.* at 21a). The court further ruled, in the only holding that petitioners challenge here, that the Customs Service drug-testing program is valid under the Fourth Amendment (*id.* at 6a-19a).

In so holding, the court of appeals agreed with petitioners that the drug-testing program—by requiring an employee to submit a urine sample and testing the sample for evidence of drug use—effects a search within the meaning of the Fourth Amendment (Pet. App. 6a-9a). The court held, however, that the program is reasonable and therefore constitutional. It first noted (*id.* at 11a) that "[t]he Service has attempted to minimize the intrusiveness of the search" by forbidding the direct observation of the collection process and by affording notice to the employee that a drug test will be given.[13] Indeed, the court explained (*id.* at 14a), because the test "is required only from those individuals who voluntarily seek employment in a covered position knowing in advance of the urinalysis requirement," the drug-testing program "is, to some extent, consensual." Also minimizing the intrusiveness of the search, the court found (*id.* at 14a-15a), is the fact that the Customs program is an aspect of an employment relationship. "Government employees may be subject to searches or other restraints on their liberties that would be impermissible in the absence of the employment relationship" (*id.* at 14a); and the court found (*id.* at 15a) that "[c]onsidering the nature and responsibilities of the jobs for which applicants are being considered at Customs and the limited scope of the search, the exaction of consent as a condition of assignment to the new job is not unreasonable."

[13] The court added (Pet. App. 11a) that the Customs program is "limited in total scope" and "prevent[s] the exercise of discretion concerning who is to be tested" because "[o]nly employees seeking transfer to sensitive positions are required to take the test and only as a result of a process that they choose to set in motion."

Arrayed on the other side of the balance, the court discerned a "strong governmental interest in employing individuals for key positions in drug enforcement who themselves are not drug users" (Pet. App. 2a). The court found (*id.* at 12a) that "[t]he use of illicit drugs has had a pernicious impact on American society" and it agreed (*id.* at 13a) that the "[u]se of controlled substances by employees of the Customs Service may seriously frustrate the agency's efforts to enforce the drug laws." In particular, the court explained (*ibid.* (footnotes omitted)), "[a]n employee's use of the substances he has been hired to interdict casts substantial doubt upon his ability to carry out his duties honestly and vigorously, and undermines public confidence in the integrity of the Service." Moreover, the court noted (*ibid.*), "[t]he drug user's questionable integrity, as well as the high financial cost of obtaining illegal drugs, may increase his susceptibility to bribery by criminal drug enterprises seeking classified information." In addition, the court stated (*ibid.*), "those employees involved in field operations, particularly if carrying firearms, endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use." Finally, the court rejected the contentions that there are less intrusive measures available and that the Customs program is not a sufficiently effective means of determining drug use in covered positions (*id.* at 17a-19a).[14] Considering "the totality of circumstances" and "weighing all of the factors" (*id.* at 11a), the court of appeals held that individualized suspicion is not required in this setting and that "the Customs Service program for

[14] The court explained (Pet. App. 17a) that "alternative sources of information do not eliminate the need for urine testing" in part because other Customs employees "may be reluctant to disclose their knowledge of the employee's drug use or may be unaware of [it]" (*id.* at 18a). And while the court recognized that employees may attempt to deceive the drug test by a brief abstention prior to the examination, it noted (*ibid.*) that "[a]ddicts may not be able to abstain for five days"; that a particular user may show traces of narcotics for a longer than average period; and that many employees may not be aware of the fact that drug traces fade away. The court concluded (*ibid.*) that "[t]he risk of detection therefore may deter drug-using employees from seeking more sensitive positions."

testing employees who seek a transfer to sensitive positions is not unreasonable" (*id.* at 19a).

Judge Hill dissented (Pet. App. 23a-27a). In his view, "the program at issue in this case is an ineffective method for achieving the Customs Service's goals, and thus it is an unreasonable invasion of the Customs Service's employees' fourth amendment rights" (*id.* at 23a). Judge Hill noted (*id.* at 25a) that under the program at issue persons already employed in sensitive positions were not subject to the test. In addition, he surmised (*id.* at 26a), "once a tested employee is accepted into a covered position, he is never tested again." "Finally, and most importantly," Judge Hill explained (*ibid.*), "employees given a five day notification of a test date need only abstain from drug use to prevent being identified as a user." Because, in his judgment, the Customs program cannot achieve its purposes, Judge Hill found it to be unreasonable under the Fourth Amendment.

On May 12, 1987, the court of appeals denied petitioners' request for a stay and ordered immediate issuance of the mandate (Pet. App. 28a). On June 1, 1987, this Court denied petitioners' application for a stay, Justice Brennan dissenting (No. A-847).

INTRODUCTION AND SUMMARY OF ARGUMENT

"Illicit trafficking in drugs," Congress has declared, "is one of the most serious crime problems facing the country." H.R. Rep. 98-1030, 98th Cong., 2d Sess. 255 (1984). The Customs Service is in many ways the first line of defense in the struggle against narcotics. To foster the efficiency, integrity, and public accountability of its employees, the Service has adopted a narrowly tailored, carefully crafted drug-testing program as a condition of placement in specific sensitive positions. The court of appeals, after weighing all of the competing factors, correctly concluded that the Customs drug-testing program is reasonable under the Fourth Amendment, even though it does not require a showing of probable cause or particularized suspicion of drug use.

A. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable" (*New Jersey* v.

T.L.O., 469 U.S. 325, 340 (1985)), and "what is reasonable depends on the context within which a search takes place" (*id.* at 337). The reasonableness of a particular search practice "is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (citation omitted).

Applying this balancing test, the Court has emphasized that a search may be reasonable under the Fourth Amendment in the absence of either a warrant or probable cause. Moreover, the Court has explained, although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976) (footnote omitted). Thus, the Court has on several occasions identified exceptions to the requirement of particularized suspicion "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field" ' " (*New Jersey* v. *T.L.O.*, 469 U.S. at 342 n.8 (citations omitted)). We believe that the balance of competing interests strongly supports the constitutionality of the Customs drug-testing program—even though it requires no particularized suspicion of drug use.

B. The Customs drug-testing program makes only the most minimal intrusion on employees' reasonable expectations of privacy. Three features of the program account for that fact.

First and most generally, the Customs drug testing program is an aspect of an ongoing employment relationship. While public employees do not forfeit Fourth Amendment rights by virtue of their employment with the government, "[t]he employee's expectation of privacy must be assessed in the context of the employment relation." *O'Connor* v. *Ortega*, No. 85-530 (Mar. 31, 1987), slip op. 7. In our view, employees—particularly those, like Customs employees, whose basic mission is to stem the surge in illegal drugs—have good reason to expect their

employer to attempt to create a drug-free workplace for sensitive positions.

Second and more specifically, the Customs drug tests are administered only to employees who have applied, and have been tentatively accepted, for promotion or transfer to one of the three categories of covered positions. Applicants know at the outset that a drug test is a requirement of those positions, and they pursue their applications with the certain knowledge that successful completion of a drug test is a condition of ultimately obtaining the job. By structuring the drug tests in this fashion, the Customs Service affords notice to employees and eliminates any role in the system for official discretion. Under this Court's cases, those factors substantially reduce the intrusiveness of the tests.

Third, the drug testing procedures themselves are narrowly tailored to respect, to the fullest extent practicable, the employees' reasonable expectations of privacy. Employees are notified in advance of the scheduled sample collection, and the collection process itself provides maximum feasible privacy. The urinalysis procedures are highly reliable; elaborate safeguards are followed to ensure accurate results; and participating laboratories must meet exacting quality assurance standards. While the process of providing a specimen may provoke, in some employees, a measure of self-consciousness, there is no warrant for the suggestion, repeatedly urged by petitioners, that the Customs Service drug-testing program is "frightening, embarassing, offensive to personal integrity, or some combination thereof" (Pet. Br. 21).

C. While the intrusion on privacy is minimal, the governmental interests at stake are substantial. Customs has a surpassing interest in ensuring that its employees are able to perform their mission efficiently; that they are insulated from threats of blackmail or corruption; and that the Service is, and is perceived by the public to be, untainted by drug use. Petitioners' contention that those goals cannot be achieved is erroneous and overlooks the government's prerogative to proceed toward its objectives one step at a time. And petitioners' suggestion that

there are "less intrusive" alternatives available is both legally irrelevant and factually without support.

ARGUMENT

THE CUSTOMS SERVICE DRUG-TESTING PROGRAM IS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT

A. A Warrantless Search May Be Valid Even In The Absence Of Particularized Suspicion

1. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *," *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). See *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). Thus, the Fourth Amendment "does not denounce all searches and seizures, but only such as are unreasonable." *Carroll* v. *United States*, 267 U.S. 132, 147 (1925). The test of reasonableness, moreover, "is not capable of precise definition or mechanical application." *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979). Rather, in defining the contours of the right to be free from unreasonable searches and seizures, this Court has repeatedly said that " 'the specific content and incidents of this right must be shaped by the context in which it is asserted.' " *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968)). See also *New Jersey* v. *T.L.O.*, 469 U.S. at 337 ("what is reasonable depends on the context within which a search takes place").

The Court has articulated a balancing test to govern this inquiry. "The permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (quoting *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983)). See also *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). This approach recognizes that not every invasion of privacy is prohibited by

the Fourth Amendment, but only "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976). "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Court has] not hesitated to adopt such a standard" (*New Jersey* v. *T.L.O.*, 469 U.S. at 341).

In examining the competing interests, the Court has often found a third consideration important—the amount of discretion left to the officials carrying out the search. See, *e.g.*, *Donovan* v. *Dewey*, 452 U.S. 594, 601-604 (1981); *Delaware* v. *Prouse*, 440 U.S. at 654, 661; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978). See also *Colorado* v. *Bertine*, 479 U.S. 367, 376-377 (1987) (Blackmun, J., concurring). Because this constraint on discretion derives from the constitutional requirement of "reasonableness" (*Delaware* v. *Prouse*, 440 U.S. at 654), the means needed to confine discretion also necessarily vary from context to context. What is required to meet the constitutional concern for controlling discretion depends on the strength of the governmental interest in a particular search practice and the impairment of privacy interests that the practice effects.

2. Applying this balancing test, the Court has held that in the context of an ordinary investigation of criminal conduct by law enforcement officers, both probable cause and a warrant are generally necessary to render a search reasonable. See *United States* v. *Karo*, 468 U.S. 705, 717 (1984); *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972). But as the Court explained most recently in *Griffin* v. *Wisconsin*, No. 86-5324 (June 26, 1987), slip op. 4 (citation omitted), exceptions from those requirements have been permitted "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " See *New Jersey* v. *T.L.O.*, 469 U.S. at 340 (quoting *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 277 (1973) (Powell, J.,

concurring)) ("although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, * * * in certain limited circumstances neither is required' ").

Where, for example, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" (*Camara* v. *Municipal Court*, 387 U.S. at 533), the Court has routinely held that a warrant is not required by the Fourth Amendment. In *Griffin* v. *Wisconsin*, *supra*, the Court held that a probation officer need not obtain a warrant before conducting a search of a probationer's residence. The Court explained that a warrant requirement "would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires" (slip op. 7). Similarly, in *New Jersey* v. *T.L.O.*, holding that school officials did not need a warrant or probable cause to search a child suspected of an infraction of school disciplinary rules, the Court found that a warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools" (469 U.S. at 340). See also *O'Connor* v. *Ortega*, No. 85-530 (Mar. 31, 1987), slip op. 11 (plurality opinion) ("requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome").

The Court has likewise found that the probable cause standard is inappropriate where it would defeat the purposes that the search is designed to achieve. For example, in the *Griffin* case the Court found that holding probation officials to a probable cause standard "would reduce the deterrent effect of the supervisory arrangement" (slip op. 9). Similarly, in rejecting a probable cause requirement in *O'Connor*, a plurality of the Court explained (slip op. 13-14) that "[t]he delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible

and often irreparable damage to the agency's work, and ultimately to the public interest." See also *New Jersey* v. *T.L.O.*, 469 U.S. at 340-342.

3. In still other contexts, the Court has recognized that a warrantless search may be reasonable even in the absence of any individualized suspicion of unlawful conduct. As the Court explained in *United States* v. *Martinez-Fuerte*, 428 U.S. at 560-561 (footnote omitted), although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion." See also *New Jersey* v. *T.L.O.*, 469 U.S. at 342 n.8; *Camara* v. *Municipal Court*, *supra*.

For example, the Court has held that no individualized suspicion is required for the Coast Guard or Customs Service to board a vessel and to examine its owner's documents. *United States* v. *Villamonte-Marquez*, *supra*. Similarly, in *Wyman* v. *James*, 400 U.S. 309, 318 (1971), the Court upheld the right of a welfare caseworker to enter the home of a welfare recipient to ensure compliance with welfare rules, even though the statute authorizing the home visit required no showing that the recipient was out of compliance with the rules. And in *United States* v. *Martinez-Fuerte*, *supra*, the Court held that border officials may stop automobiles at permanent checkpoints without any individualized suspicion.

Each of these cases reflects the Court's statement in *T.L.O.* that "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field" ' " (469 U.S. at 342 n.8 (citations omitted)). As we show below, the Customs drug-testing program amply satisfies that standard.

B. The Customs Drug-Testing Program Involves a Minimal Intrusion on Employees' Expectation of Privacy

1. *The employment relationship*

A first and quite general feature of the Customs drug-testing program, which significantly minimizes its interference with

expectations of privacy, is the fact that the test is conducted as an aspect of the employment relationship. While "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer[,] • • • [t]he operational realities of the workplace • • • may make *some* employees' expectations of privacy unreasonable" (*O'Connor* v. *Ortega*, slip op. 6 (emphasis in original)). Thus, "[t]he employee's expectation of privacy must be assessed in the context of the employment relation" (*id.* at 7).

In the *Ortega* case, for example, the plurality found that the search of an employee's office " 'involve[d] a relatively limited invasion' " of privacy, noting that "the privacy interests of government employees in their place of work • • •, while not insubstantial, are far less that those found at home or in some other contexts" (slip op. 14). More generally, this Court has consistently recognized that the government, in its capacity as an employer, may impose reasonable employment-related restrictions on the rights of employees that would be plainly unconstitutional if imposed on citizens at large. See, *e.g.*, *Rankin* v. *McPherson*, No. 85-2068 (June 24, 1987), slip op. 5; *Connick* v. *Meyers*, 461 U.S. 138, 147 (1983); *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980); *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). Put another way, "the government's interest as an employer in fit employees may allow it to deny employment when it cannot as a sovereign attac[h] other consequences to the protected view" (Pet. App. 38a).[19]

This proposition has particular force in the context of the Customs Service. When they accept a position with the Service, especially a sensitive position, Customs employees necessarily commit themselves to the mission of the agency – to enforce the narcotics laws. By its nature, that mission entails a number of important restrictions on their liberties. Customs employees

[19] As Judge Higginbotham observed below (Pet. App. 38a), "[a]n anarchist's political view is protected by the first amendment. But I would not suppose that his constitutional protection extends to the right to be an FBI agent."

may be asked to take on difficult and dangerous tasks. They may be subject to a strict chain of command. Their dress may be regulated in one way while they are in the field and in another way when they give testimony in court. In short, employees may be, and routinely are, required to comport themselves in ways that conform to the requirements of the agency. That does not mean, of course, that Customs employees lack any cognizable zone of privacy. It does suggest, however, that Customs employees should not find it "frightening, embarassing, [and] offensive to personal integrity" (Pet. Br. 21) when their employing agency – which is sworn to enforce the narcotics laws, to protect the public, and to safeguard classified information from threats of blackmail or corruption – decides to promote its mission by insisting on a reasonable procedure to promote a drug-free workplace for specific sensitive positions.

2. ***The provision of notice and the elimination of official discretion***

A second, and more specific, feature of the Customs program, which also minimizes its intrusiveness on employees' privacy, is the fact that the testing is "a condition of placement/employment in the specified positions" (J.A. 19). Thus, an employee who applies for a covered position knows at the outset that a drug test is a prerequisite for obtaining the job; after he is tentatively selected, the employee is advised by letter that "[c]ontinued consideration for th[e] position is contingent upon satisfactory completion of a drug screening test" (J.A. 81). Moreover, although an applicant who refuses to take the test will lose consideration for the position sought, his subsequent applications will not be affected: no adverse actions will be taken against him, and no documentation adversely affecting subsequent applications will be maintained (J.A. 36). By structuring its drug-testing program in this fashion, Customs has minimized the intrusion on employees' reasonable expectations of privacy in two central respects.

a. First, by giving its employees advance notice of the test, Customs reduces to a minimum any "unsettling show of authority" (*Delaware* v. *Prouse*, 440 U.S. at 657) that may be associated with unexpected intrusions on privacy. Unlike the

subject of an arrest warrant, who may be aroused unexpectedly by police at his doorstep (see *Payton* v. *New York*, 445 U.S. 573 (1980)), or a driver, who may experience "substantial anxiety" from a "sporadic and random stop[ ]" of his automobile" (*Prouse*, 440 U.S. at 657), a Customs employee has the certain knowledge that drug testing comes with the job.

For those reasons, the court of appeals concluded (Pet. App. 14a) that "[t]he Customs Service test is, to some extent, consensual"; and as this Court has many times explained, "a search authorized by consent is wholly valid." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). See also *United States* v. *Matlock*, 415 U.S. 164 (1974). This Court's decision in *Zap* v. *United States*, 328 U.S. 624 (1946), vacated on other grounds, 330 U.S. 800 (1947), makes that point in a closely related context. There, the petitioner, a defense contractor, had entered into an agreement with the Navy Department to perform experimental work on airplane wings. The agrement specified that the contractor's books and records would be available at all times for review by the government. During the life of the contract, FBI agents conducted an audit of the petitioner's records, and evidence discovered in that audit was later introduced against the petitioner at trial. This Court held that the government's audit did not violate the Fourth Amendment. The Court explained (328 U.S. at 628) that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." The Court concluded (*id.* at 629) that the agents "were lawfully on the premises" and had "obtained by lawful means access to the documents. That much at least was granted by the contractual agreement for inspection." [16]

[16] *See also Davis* v. *United States*, 328 U.S. 582 (1946); *United States* v. *Lopez-Pages*, 767 F.2d 776, 779 n.2 (11th Cir. 1985) (air traveler's consent based on notice on sign that passengers are subject to search); *United States* v. *DeAngelo*, 584 F.2d 46, 47-48 (4th Cir. 1978) (same), cert. denied, 440 U.S. 935 (1979); *United States* v. *Freeland*, 562 F.2d 383, 385-386 (6th Cir.) (same),

But even if the employee's consent to the drug test does not altogether eliminate any Fourth Amendment concern, it certainly minimizes any cognizable intrusion on privacy. This Court's decision in *Wyman* v. *James*, 400 U.S. 309 (1971), confirms the point. In *Wyman*, the Court held that the Fourth Amendment did not preclude welfare caseworkers from visiting the homes of welfare recipients to ensure compliance with the welfare program. Although the statute in question did not require any allegation that the recipients were abusing the welfare system, the Court found no violation of the Fourth Amendment. Indeed, because of the consensual nature of the visits, the Court was not persuaded that the visits constituted searches at all. The Court noted (*id.* at 317-318) that "the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search." In any event, the Court explained, even if the caseworker's visit might be construed as a search ("perhaps because the average beneficiary might feel she is in no position to refuse consent to the visit" (*id.* at 318)), the visits were nevertheless reasonable. In so holding, the Court found (*id.* at 320) that "[t]he means employed" to make the searches were "significant," in that the recipient was given "written notice several days in advance of the intended home visit" (*ibid.* (footnote omitted)). The Court explained that this feature "minimize[d] any 'burden' upon the homeowner's right against unreasonable intrusion" (*id.* at 321).[17]

cert. denied, 434 U.S. 957 (1977); *McMorris* v. *Alioto*, 567 F.2d 897 (9th Cir. 1978) (attorney's consent to magnetometer search as condition of entering courthouse); *United States* v. *Sihler*, 562 F.2d 349, 350-351 (5th Cir. 1977) (prison employee's consent based on notice on sign stating that all persons entering prison are subject to search); *United States* v. *Ellis*, 547 F.2d 863 (5th Cir. 1977) (visitors to Naval station may be required to consent to warrantless search of automobile); *United States* v. *Davis*, 482 F.2d 893, 913-914 (9th Cir. 1973) (air traveler's consent to pre-boarding search for weapons); *United States* v. *Skipwith*, 482 F.2d 1272 (5th Cir. 1973) (same).

[17] The Court has made much the same point in its administrative inspection cases. In *United States* v. *Biswell*, 406 U.S. 311 (1972), for example, the Court

Here, as in *Wyman*, the Customs Service drug tests are not "forced or compelled." If consent to the test is refused, the employee suffers no penalty, other than forfeiting consideration for the covered position at that time. The Service creates no permanent record of the refusal, nor is any adverse action taken against the employee. As the Court put the matter in *Wyman*, affording notice and making participation voluntary "minimizes any 'burden' upon the [employee's] right against unreasonable intrusion." [18] See also *National Fed'n of Fed. Employees* v. *Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987); *Shoemaker* v. *Handel*, 795 F.2d 1136, 1142 (3d Cir.), cert. denied, 479 U.S. 986 (1986); *Security & Law Enforcement Employees, District Council 82* v. *Carey*, 737 F.2d 187, 201-202 & n.23 (2d Cir. 1984).

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upheld the statutorily-authorized, warrantless search of the locked storeroom of a licensed gun dealer, which resulted in the seizure of unlicensed firearms. The Court explained (*id.* at 316) that inspections under the statute "pose only limited threats to the dealer's justifiable expectations of privacy" since "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." See also *Michigan* v. *Tyler*, 436 U.S. 499, 514 (1978) (Stevens, J., concurring in part and concurring in the judgment) ("[t]he Fourth Amendment interests involved in this case could have been protected in either of two ways—by a warrant, if probable cause existed; or by fair notice, if neither probable cause nor a special law enforcement need existed"). At least two courts of appeals have relied on this Court's administrative inspection cases in upholding drug testing programs that did not require a showing of individualized suspicion. See *Rushton* v. *Nebraska Public Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (nuclear plant engineers); *Shoemaker* v. *Handel*, 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986 (1986) (race track employees). But see *Railway Labor Executives' Ass'n* v. *Burnley*, 839 F.2d 575 (9th Cir. 1988), cert. granted, No. 87-1555 (June 6, 1988).

[18] For many of the same reasons, it may also be argued, as this Court concluded in *Wyman* (400 U.S. at 317-318), that the Customs drug-testing program is not a Fourth Amendment search at all. Federal government employees routinely submit to fingerprint checks, full field background investigations, physical examinations and, for employees engaged in national security functions, questioning subject to polygraphs as conditions of employment. These employment tests involve differing degrees of intrusiveness into an employee's privacy as well as exercises of dominion and control, albeit slight, over the employee. Nonetheless, we are aware of no decision holding that such tests, when imposed as a reasonable condition of employment, interfere with reasonable expectations of privacy or otherwise raise Fourth Amendment questions. See *McDonell* v. *Hunter*, 612 F. Supp. 1122, 1130 n.6 (S.D. Iowa 1985), aff'd, 809 F.2d 1302 (8th Cir. 1987). Cf. *Brachter* v. *United States*, 149 F.2d 742 (4th Cir.), cert. denied, 325 U.S. 885 (1945) (routine, warrantless pre-induction physical upheld); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 114 (1964) (physical examination required of defendant under Fed. R. Civ. P. 35 is "free of constitutional difficulty"). Moreover, here, as in *Wyman*, the test is a prerequisite for the receipt of particular benefits that may freely be accepted or declined. The employee knows of the test in advance and participates in it, at his option, as he might in any other pre-employment examination. Accordingly, in our view *Wyman* is persuasive authority for the proposition that an employee drug-testing program—containing these or substantially similar features—does not entail "any search by the [government] in the Fourth Amendment meaning of that term" (400 U.S. at 317). To resolve that issue, however, would require this Court to render a decision with broader implications than the facts of this case demand. We are therefore content to rest our defense of the Customs program on the essential reasonableness of the program itself.

b. Second, by subjecting all applicants to a drug test as a condition of transfer to a covered position, the Customs Service has eliminated any official discretion from its drug-testing program. This Court has explained that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order ' "to safeguard the privacy and security of individuals against arbitrary invasions * * * " ' " (*Delaware* v. *Prouse*, 440 U.S. at 653-654 (footnote and citations omitted)).[19] Thus, as the Court stated in *Prouse*, "[i]n those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field' " (440 U.S. at 655 (footnote omitted) (quoting *Camara* v. *Municipal Court*, 387 U.S. at 532)). See also *New Jersey* v. *T.L.O.*, 469 U.S. at 342 n.8.

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[19] See also *United States* v. *Ortiz*, 422 U.S. 891, 895-896 (1975); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882 (1975).

Under the Customs program, every employee who seeks to transfer to a covered position must take a drug test. The Service has no discretion in that regard. It may not carve out exceptions; nor may it select particular employees, but not others, to test. Every test is conducted in the same way, is analyzed the same way, and is reported the same way. "The urinalysis results are either positive or negative leaving no room for official discretion in interpreting the tests" (Pet. App. 11a-12a (footnote omitted)). Indeed, the principal discretion in the entire process is exercised by the employee—when he elects to apply for, and thereafter pursue, a covered position, knowing that a drug test will eventually be required. Like the police inventory searches upheld in *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), "no significant discretion is placed in the hands of the individual officer," who has "no choice as to the subject of the search or its scope" (*id.* at 384 (Powell, J., concurring) (footnote omitted)). See also *Colorado* v. *Bertine*, 479 U.S. at 376-377 (Blackmun, J., concurring).

c. These same factors—the provision of notice and the elimination of discretion—persuaded this Court, in *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), to uphold under the Fourth Amendment the stopping of vehicles at permanent checkpoints in the absence of any individualized suspicion that the particular vehicle contained illegal aliens. Finding that the "intrusion on Fourth Amendment interests is quite limited" (*id.* at 557), the Court explained (*id.* at 559), first, that motorists "are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere." Second, the Court stated (*ibid.*), "checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest." The Court concluded that "[a]s the intrusion here is sufficiently minimal[,] * * * no particularized reason need exist to justify it" (*id.* at 563).

We believe that the same principles control this case. Here, as in *Martinez-Fuerte*, employees are "not taken by surprise" when they are asked to take a drug test. They know about the test before they seek a transfer and they are reminded about the test after they have been tentatively selected for a position. Moreover, because the test is given to all applicants, the drug-test program "both appear[s] to and actually involve[s] less discretionary enforcement activity." The intrusion on privacy, as in *Martinez-Fuerte*, is therefore "sufficiently minimal that no particularized reason need exist to justify it." [20]

3. ***The narrowly-tailored nature of the testing procedures***

Finally, the actual procedures employed by the Customs Service, as supplemented by the recently promulgated HHS regulations, are narrowly tailored to respect employees' reasonable expectations of privacy. Applicants are notified by letter that a drug test will be required (J.A. 26-27, 81-85), and an independent contractor thereafter contacts the employee to schedule the sample collection. At the time of the collection, the employee is asked, as petitioners put it, "to divulge personal medical information, including all medications of any kind taken within the last thirty days" (Pet. Br. 20); but that information remains sealed unless and until there is a confirmed positive result from

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[20] We do not mean to suggest that the Customs program—which limits official discretion by subjecting all persons selected for designated sensitive positions to a test—is the only constitutionally acceptable means of limiting official discretion. Post-accident testing, such as that at issue in *Burnley* v. *Railway Labor Executive's Ass'n*, No. 87-1555, also effectively restricts official discretion. In addition, the government is presently defending particular drug testing programs that involve random selection of employees for testing according to neutral criteria (such as Social Security number or birth date). *American Federation of Government Employees* v. *Dole*, No. 87-5417 (D.C. Cir.) (air traffic controllers and certain other Department of Transportation employees); *National Federation of Federal Employees* v. *Carlucci*, Nos. 88-5080, 88-5081, 88-5082 (D.C. Cir.) (Department of the Army employees occupying aviation positions, security guards, law enforcement positions, employees involved with chemical warfare or nuclear materials, alcohol and drug abuse counselors, and employees at Army forensic drug testing laboratories). See Adams, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U. Chi. L. Rev. 1335, 1367-1368 (1987).

the drug test, and is then used only to rebut, if possible, the inference of illegal substance abuse (J.A. 30-31). In addition, if the employee wishes to withhold medical information at this point, he may do so, without placing any restriction on his ability later to reveal this information in confidence to the Medical Review Officer to explain a positive test result. See n.5, *supra*. The actual collection process is not directly observed; the employee provides a specimen in the privacy of a stall (J.A. 29; HHS Reg. § 2.2(f)(7)). The collector then measures the temperature of the sample to ensure that it has not been adulterated, places a tamper-proof seal over the bottle, prepares a chain-of-custody form, and submits the bottle to the laboratory (J.A. 30-31; HHS Reg. § 2.2(f)(12), (19), (20), (24), (25), (g) and (h)). The laboratory, in turn, must be specially certified (see nn.8, 9, *supra*), must follow strict chain-of-custody procedures, must perform confirmatory analyses of the samples (conceded by all parties to be reliable), and must submit its results to a Medical Review Officer, who only after confirming the findings reports them to the agency (HHS Reg. §§ 2.4(a)(2), (f)(1) and (g), 2.5, 2.7(a), (b) and (c), 3.17, 3.18; J.A. 32; Pet. App. 5a).

We acknowledge that some persons may feel self-conscious about the actual collection process; if no one did, it would be hard to locate any expectation of privacy at all. But, through petitioners' lens, that momentary self-consciousness is magnified into a process that is at once "frightening, embarassing, offensive to personal integrity, or some combination thereof," causing an "apprehension • • • at the prospect of having one's urine captured and analyzed" (Pet. Br. 21). Those metaphors, however, greatly exaggerate the extent to which the Customs program deviates from the ordinary daily experience of the typical Customs employee. Customs employees are required to produce a urine specimen in a private stall; but virtually all employees use public restrooms every working day for their own bodily needs. The collecting official remains within earshot of the stall and listens for the urination; but other persons can and routinely do overhear others engaged in excretory

functions during the normal work day, and there is no special right of privacy for activities that persons routinely allow others to overhear. Cf. *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986); *Smith* v. *Maryland*, 442 U.S. 735 (1979); *United States* v. *Miller*, 425 U.S. 435, 443 (1976). And while persons do not reasonably expect others to intrude into their private space during the process of urination, Customs collectors do not do so either. Indeed, the Customs Service has carefully instructed its contractors to respect the privacy of its employees (J.A. 96-97). Thus, as Judge Higginbotham concluded below, "[t]he precise privacy interest asserted is elusive" in this case, since "apart from the partial disrobing (apparently not independently challenged) persons using public toilet facilities experience a similar lack of privacy" (Pet. App. 36a).[21]

In our view, the Customs collection process, while perhaps novel in terms of the narrowness of its focus, is not materially different from any number of medical and physical examinations required by employers in the public and private sectors as a condition of employment.[22] The federal government, for one, routinely requires applicants for jobs with particular physical or medical demands to submit to physical examinations (5 C.F.R. 339.301(a)(1)) and imposes the same requirement, on a regularly recurring basis, on current employees in those positions (5 C.F.R. 339.301(a)(2)). We are advised, for example, that crim-

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[21] Petitioners also exaggerate the nature of urinalysis when they describe it (Br. 32) as an "[i]ntrusion[ ] into the body itself." Unlike a blood test (see *Schmerber* v. *California*, 384 U.S. 757 (1966)), the extraction of a bullet (see *Winston* v. *Lee*, 470 U.S. 753 (1985)), or even the removal of fingernail scrapings (see *Cupp* v. *Murphy*, 412 U.S. 291 (1973)), the urine samples are produced by the employee and turned over to the collector.

[22] Cf. *New York Transit Auth.* v. *Beazer*, 440 U.S. 568, 591 n.37 (1979) ("a simple urine test" was sufficient to prove compliance with Transit Authority's rule against employing drug users); *Schmerber* v. *California*, 384 U.S. at 771 n.13 (citation omitted) (" '[t]he blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors' ").

inal investigators, specialists, and auditors for the Bureau of Alcohol, Tobacco, and Firearms must undergo complete physical exams, including a urine test for sugar levels; special agents, operations support technicians, protective support technicians, special officers, and motor vehicle operators for the Secret Service likewise undergo a comprehensive physical, including blood and urine testing; motor vehicle operators, police officers, printing plant workers, and industrial power truck operators for the Government Printing Office are given routine physicals as a condition of employment; and border patrol agents, criminal investigators, and immigration inspectors for the Immigration and Naturalization Service are given pre-employment physicals that include blood and urine tests. The courts have approved such tests when imposed as a reasonable condition of employment. See, *e.g.*, *McDonell* v. *Hunter*, 612 F. Supp. 1122, 1130 n.6 (S.D. Iowa 1985), aff'd, 809 F.2d 1302 (8th Cir. 1987). Cf. *Bratcher* v. *United States*, 149 F.2d 742, 745-746 (4th Cir.), cert. denied, 325 U.S. 885 (1945). As Judge Higginbotham explained below (Pet. App. 36a), "the information gained in tests of urine is not different from that disclosed in medical records, for which consent to examine is a routine part of applications for many sensitive government posts."

Petitioners contend, however, that the collection process infringes employees' right "to control both the timing and the ultimate disposition of his own waste" (Br. 22 n.16). But again, petitioners overstate the strength of that interest. As Judge Higginbotham observed (Pet. App. 36a), "[f]inding an objectively reasonable expectation of privacy in urine, a waste product, contains inherent contradictions." Like the disposal of trash, which the Court in *California* v. *Greenwood*, No. 86-684 (May 16, 1988), recently held to be outside one's reasonable expectation of privacy, urine is only briefly "possessed", if at all, and is

quickly abandoned. To be sure, persons expect to dispose of urine on their own terms; but the interference with that ephemeral interest, we suggest, is minor, hardly warranting what petitioners extravagantly term "the apprehension one feels at the prospect of having one's urine captured and analyzed" (Br. 21).[23]

Petitioners also contest the Customs program because, in their view (Br. 28-29), the physical examination of the urine sample has "the potential for the revelation of anatomical secrets hidden in urine" including a "wealth of information" such as "pregnancy, epilepsy, or diabetes, treatment of psychiatric disorders, use of contraceptives, or other personal information." The Customs Directive makes clear, however, that the drug test may be used to discern only specified illegal drugs (J.A. 32). And the HHS regulations expressly forbid participating laboratories from testing for any other substances (HHS Reg. § 2.1(c))—a prohibition included in the regulations specifically "[i]n response to concern that specimens may be misused to test for physiological states other than drug use (e.g., pregnancy)" (53 Fed. Reg. 11975 (1988)). Since that proscription is easy to obey—both by refusing to make the prohibited analyses and by maintaining the anonymity of the individual samples at the laboratory—there is no warrant for petitioners' assumption that the government will violate its own regulations, and that employees' "anatomical secrets" will thereby be compromised. Cf. *INS* v. *Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (presumption of regularity supports official act of pub-

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[23] We also dispute petitioners' suggestion (Br. 22 n.16) that the Customs Service "seizes" its employees when it directs them to produce a urine sample as a condition of promotion to a sensitive position. Under this argument, the Fourth Amendment would be implicated every time a public employer directed an employee to participate in an employment-related physical examination. Moreover, the direction to provide a urine sample is surely no more of a seizure than the compulsion of a grand jury subpoena—which is enforceable by contempt—to produce voice exemplars, handwriting, or fingerprints. And yet this Court has held that such subpoenas are not seizures within the meaning of the Fourth Amendment. See *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Mara*, 410 U.S. 19 (1973).

lic officer); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971) (same); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) (same).

The fact that urine specimens are tested *only* for the presence of illegal narcotics eliminates any claim that the process of analysis itself intrudes on any legitimate privacy interests. This Court has held that a laboratory analysis that tests only for unlawful substances is not a "search" at all within the meaning of the Fourth Amendment. See *United States* v. *Jacobsen*, 466 U.S. 109, 123 (1984); *United States* v. *Place*, 462 U.S. 696 (1983). Consequently, the only part of the drug-testing process that even implicates Fourth Amendment interests is the collection of urine specimens. And as we have already demonstrated, because of the multiple safeguards built into the process—including advance notice, the elimination of any significant measure of discretion, and the narrowly tailored nature of the testing procedures themselves—the impact of the Customs program on privacy interests is minimal indeed.

C. The Customs Drug-Testing Program Serves Compelling Governmental Interests

1. "As the record demonstrates, and as the whole nation knows, traffic in illegal drugs with its enormous destruction of life is a national problem" of surpassing importance (Pet. App. 35a). "Illicit trafficking in drugs," Congress has declared, "is one of the most serious crime problems facing the country." H.R. Rep. 98-1030, 98th Cong., 2d Sess. 255 (1984). This Court's cases tell a small but representative part of the story. They trace the path of narcotics from the ships and airplanes (see, *e.g.*, *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983); *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985)), across the country (see, *e.g.*, *Illinois* v. *Gates*, 462 U.S. 213 (1983)), to the streets of the inner cities (see, *e.g.*, *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987); *Maryland* v. *Garrison*, No. 85-759 (Feb. 24, 1987); *United States* v. *Ross*, 456 U.S. 798 (1982)), and the classrooms of the nation's schools (see, *e.g.*, *New Jersey* v. *T.L.O.*, *supra*). They recount, if briefly, the elaborate schemes for importing narcotics (see, *e.g.*, *United States* v. *Ramsey*, 431 U.S. 606 (1977)), the "highly sophisticated narcotics * * * network[s]" that control its manufacture and distribution (*Jeffers* v. *United States*, 432 U.S. 137, 139 (1977) (plurality opinion); see also *Garrett* v. *United States*, 471 U.S. 773 (1985)), and the hundreds of laboratories and distribution outlets, across the country, that produce, package, and market the drugs to the consuming public. See, *e.g.*, *United States* v. *Dunn*, No. 85-998 (Mar. 3, 1987); *Henderson* v. *United States*, 476 U.S. 321 (1986); *Segura* v. *United States*, 468 U.S. 796 (1984). And they tell, unfortunately, of the random, senseless violence that is in every sense a tool of the trade. See, *e.g.*, *Booth* v. *Maryland*, No. 86-5020 (June 15, 1987); *Richardson* v. *Marsh*, No. 85-1433 (Apr. 21, 1987); *Allen* v. *McCurry*, 449 U.S. 90 (1980). See also *United States* v. *Alvarez*, 810 F.2d 879, 892-897 (9th Cir. 1987) (Noonan, J., dissenting) (collecting cases).

The Customs Service is in many ways the first line of defense in the nation's struggle with narcotics. As "the nation's primary border enforcement agency," the Service "is charged with the responsibility for interdicting illegal drugs that enter the country" (J.A. 109). To ensure that the Service is able to discharge that responsibility, the Commissioner has approved a narrowly tailored drug-testing program that focuses on positions that directly involve the employee with drug interdiction, or that require the employee to carry firearms, or that require the employee to handle classified material. The Customs drug-testing program serves three vital purposes.

First among these is the safe and efficient discharge of Customs operations.[24] As the Commissioner found (J.A. 113),

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[24] This Court noted the importance of that concern in its decision in the *Ortega* case. There, the Court observed (slip op. 13) that "[p]ublic employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement or other work-related misfeasance of its employees. Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe."

"[i]llegal drug use dulls the ability to think and react quickly, clouding the employee's judgment and endangering other lives and government property." Studies have indicated that drug abusers typically function at only fifty to sixty-seven percent capacity; that they suffer a rate of absenteeism ranging between 2.5 and 16 times higher than employees who do not use drugs; and that they have a significantly higher turnover rate, leaving their jobs, on average, between 10 and 16 months earlier than employees who do not use drugs. See Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 Chi[-]Kent L. Rev. 683, 688-689 & nn.23, 25, 29 (1987) (citing studies). Drug abusers are likely to show "inadequate preparation, impaired memory, lethargy, reduced coordination, carelessness, mistakes, and slowdowns" (*id.* at 688 (footnote omitted), citing studies). And as the court of appeals observed (Pet. App. 13a), "those employees involved in field operations, particularly if carrying firearms, endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use."

In addition, the Customs drug-testing program promotes the integrity of Customs operations. As the Commissioner has explained (J.A. 114), employees who use illegal drugs "may be bribed into disclosing [classified] information to a criminal drug enterprise, and they may have a financial need to exchange information valuable to smugglers in order to support their habit." Indeed, the Commissioner observed (*ibid.*), "[g]iven the incredible sums of money involved, it is not surprising that Customs Officers have been the targets of bribery by drug smugglers on numerous occasions, and several Customs officers have been removed for accepting such bribes and other integrity violations in past years." While we certainly agree with petitioners that the overwhelming majority of Customs employees "only seek the opportunity to serve their country in its battle against traffic in illegal drugs" (Pet. Br. 48), no one, including petitioners, disputes that there are, and will continue to be, exceptions to that rule, particularly as Customs fulfills the congressional mandate to augment its ranks considerably (see J.A.

114).[23] See, *e.g.*, *United States* v. *Hall*, 739 F.2d 96 (2d Cir. 1984); *Masino* v. *United States*, 589 F.2d 1048 (Ct. Cl. 1978). Cf. *Heron* v. *McGuire*, 803 F.2d 67, 68 (2d Cir. 1986) (per curiam).

Finally, the Customs Service has a substantial interest in ensuring that its employees do not damage the agency's public reputation. This Court has several times recognized the importance of that interest. For example, in *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980), the Court held that the Central Intelligence Agency has a "compelling interest" in maintaining "the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." Similarly, in sustaining the Hatch Act against First Amendment challenge, the Court held that Congress has a substantial interest, not only in ensuring that federal service employees "in fact avoid practicing political justice," but also in ensuring "that they appear to the public to be avoiding it." *United States Civil Service Commission* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973). And in sustaining the Lloyd-La Follette Act (5 U.S.C. 7501) against First Amendment challenge, the Court upheld a federal regulation (5 C.F.R. 735.201a(f)) providing that a civil servant may be removed for engaging in expressive activity that "[a]ffect[s] adversely the confidence of the public in the integrity of the Government." *Arnett* v. *Kennedy*, 416 U.S. 134, 141-142 (1974). In each of these cases, the Court recognized that the government has an overriding interest in regulating employee behavior "which improperly damages and impairs the reputation and efficiency of the employing agency" (*id.* at 162).

As a law enforcement agency, Customs naturally has a strong and legitimate interest in maintaining the reputation and appearance of being fully committed to enforcement of the law. It depends on the public for tips about criminal activity and for testimony in support of its enforcement efforts. Customs of-

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[23] As the Commissioner explained (J.A. 112), the Customs "applicant pool is drawn from a society where drug abuse is widespread" and there is "no reason to believe that this applicant pool is somehow immune to a problem that has pervaded all socio-economic classes of our society."

ficers must themselves frequently testify in trials and other public proceedings, in which the credibility of the officers, and of the agency generally, is critically at issue. Perhaps most importantly, Customs relies on the public for voluntary compliance with the letter of the law. To maintain this spirit of cooperation, Customs may properly insist that its employees possess the highest standards of professional conduct, on and off the job. For if a law enforcement agency and its employees do not take the law seriously, neither will the public on which the agency's effectiveness depends. See *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("For good or for ill, [our Government] teaches the whole people by its example.").

2. Petitioners acknowledge (Br. 39-40) that "Customs' stated objective for its plan is an important one" and that its goals are "unexceptionable" (*id.* at 40). They contend (*id.* at 46), however, that the program cannot succeed since "virtually anyone who uses illegal drugs can avoid detection by temporary abstinence." Petitioners accordingly surmise that "a search that can so easily be thwarted will not serve as an effective deterrent to prevent illegal drug users from seeking Customs positions" (*id.* at 46-47).

Petitioners overstate the case. As the court of appeals explained, "[a]ddicts may not be able to abstain" prior to the test, and other employees, who "may not * * * be aware of the fade-away effect" of narcotics, may not choose to abstain (Pet. App. 18a). There are also significant differences in how quickly traces of narcotics disappear from the body. The record in this case shows, for example, that while in most cases marijuana becomes undetectable within "two to five days," it may remain in the body considerably longer in cases of "chronic users" (J.A. 60 (affidavit of John P. Morgan))—in some instances for as much as 22 or 30 days (J.A. 66 (affidavit of Dr. Arthur J. McBay)). Thus, as the court of appeals found (Pet. App. 18a), "a particular user still faces a significant risk that his test would be positive." That "risk of detection therefore may deter drug-using employees from seeking more sensitive positions" (*ibid.*).

Still other drug users, who choose to abstain temporarily prior to the test, may miscalculate the necessary period of abstention and test positive despite their efforts at evasion. Indeed, notwithstanding the notice provision, at least five applicants have produced positive urine samples since the inception of the Customs drug-testing program (Pet. Br. 8).

But even if the Customs drug-testing program cannot ferret out every abuser, that does not make it unreasonable under the Fourth Amendment. To be sure, by affording employees notice of the drug test, the Customs Service may have allowed some drug users to evade the test. But, by furnishing notice, the Service has also reduced the intrusiveness of the process. Customs was entitled to strike the balance—plainly a reasonable one—that it thought was appropriate under the circumstances. Here, as elsewhere, the government "may take one step at a time, addressing itself to the phase of the problem which seems most acute." *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955).[26]

3. Petitioners also contend (Br. 35 (footnote omitted)) that "Customs has not demonstrated that a probable cause standard would prevent its investigating and punishing workplace wrongdoing." Alternatively, petitioners argue (Br. 37-48) that Customs must meet a "reasonable suspicion" standard before conducting a drug test. As a threshold matter, we do not see why, in light of the balance of competing interests, the Customs program should be measured by either standard. As this Court explained in the *T.L.O.* case, "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Court has] not hesitated to adopt such a standard" (469 U.S. at 341).

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[26] There is a certain irony to petitioners' argument, because it effectively contends, as the court of appeals put it (Pet. App. 19a), that "the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy." In fact, the Customs Service presently contemplates supplementing the current program with a random testing plan for all sensitive employees. The fact that random testing has not yet been implemented does not undercut the reasonableness of the present testing program.

Accord *O'Connor* v. *Ortega*, slip op. 12. The balance of interests in this case places the Customs program squarely within the "[e]xceptions to the requirement of individualized suspicion"—that is, where "the privacy interests implicated by a search are minimal and * * * 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field" ' " (*New Jersey* v. *T.L.O.*, 469 U.S. at 342 n.8).

In any event, petitioners endorse probable cause (or at least particularized suspicion) as an appropriate legal standard only by ignoring most of the objectives that Customs seeks to achieve by conducting drug tests of employees in sensitive positions. Probable cause or particularized suspicion may be workable where an agency merely seeks, in petitioners' words, to "punish workplace wrongdoing." But Customs has a broader, and in many respects more important, agenda. It also seeks to *deter* wrongdoing, to *insulate* employees from threats to integrity, and to *promote* the public reputation of the agency. The margin of error associated with a probable cause or particularized suspicion standard is singularly unsuited to those ends. As in *United States* v. *Martinez-Fuerte*, imposing either standard would reduce the deterrent effect (see 428 U.S. at 557) of the drug-testing program, by allowing drug users to persist in their habit until sufficient evidence accumulates against them. And if Customs were required to await palpable evidence of misconduct before it could intervene, the result could be an incalculable loss to the agency's enforcement mission and to its public reputation as a law enforcement agency. In view of the minimally intrusive nature of the Customs program, and the surpassing importance of its objectives, there is no basis for requiring the agency to absorb such costs. See *O'Connor* v. *Ortega*, slip op. 14.[27]

[27] Petitioners also insist on a probable cause or reasonable suspicion standard to reduce the intrusiveness of a program in which, as they estimate it, "99.99 + % of those searched have been innocent" (Br. 26). The same might be said, we suppose, about the searches of automobiles at fixed checkpoints in *Martinez-Fuerte*: there, too, the vast majority of cars doubtless did not contain illegal aliens. But as Justice Powell explained in his concurring opinion in *South Dakota* v. *Opperman*, 428 U.S. 364, 378 (1976), rejecting a similar challenge to police inventory searches, "the occasional danger that may exist cannot be discounted entirely. * * * The harmful consequences in those rare cases may be great, and there does not appear to be any effective way of identifying in advance those circumstances or classes of automobile impoundments which represent a greater risk." In any event, the high percentage of negative test samples may well be a result of the deterrent value of the drug-testing program itself.

4. Finally, petitioners contend (Br. 45) that there are "less intrusive means to address the stated problem," including reliance on " 'physical observation * * *, citizen complaints, tips from other law enforcement agencies and other means' " (*id.* at 35 (citation omitted)). But "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois* v. *Lafayette*, 462 U.S. 640, 647 (1983). This Court has cautioned against "indulg[ing] in 'unrealistic second-guessing,' " because " 'creative judge[s], engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished' " (*United States* v. *Montoya de Hernandez*, 473 U.S. at 542, quoting *United States* v. *Sharpe*, 470 U.S. 675, 686-687 (1985)). As the Court has explained, "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers" (*United States* v. *Martinez-Fuerte*, 428 U.S. at 556-557 n.12). Accord *Colorado* v. *Bertine*, 479 U.S. at 373-375; *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973).

In any event, petitioners do not explain why their suggested alternatives would be as effective as the Customs drug-testing program. Relying on colleagues and supervisors to detect symptoms of drug use, while of some benefit, cannot suffice. As the Federal Railroad Administration recently observed, after studying the various alternatives at length, "the symptoms of drug use are often undetectable by even a reasonably trained supervisor. Further, some 'functional' drug users seem able to avoid job-

related problems until their problems reach a crisis stage." 53 Fed. Reg. 16640 (1988). Moreover, some drugs have "delayed, residual or chronic effects not ascertainable through behavioral observation." *Transport Workers' Union, Local 234* v. *Southeastern Pennsylvania Transp. Auth.*, 678 F. Supp. 543, 550 (E.D. Pa. 1988). Accord *Schaill* v. *Tippecanoe County School Corp.*, 679 F. Supp. 833, 857-858 (N.D. Ind. 1988). Petitioners' preference for observation by co-workers is particularly misplaced in this case, because applicants for sensitive positions have not yet been exposed to the special pressures of a job at the forefront of the drug interdiction effort (and thus cannot have been "observed" under relevant conditions).[28] Beyond that, Customs employees often work alone, for example in undercover operations or in other settings in which close observation is difficult. Scrutiny by fellow employees may also be inconsistent with the demands of colleagueship; employees simply may not be willing to report substance abuse by their fellow workers (see Pet. App. 17a-18a). And even were such reporting likely, on-the-job scrutiny can discern only on-the-job impairment; it cannot determine, as drug testing can, the use of narcotics off the premises—use that is equally inconsistent with the integrity objectives of the Service.[29]

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[28] As the court of appeals explained (Pet. App. 17a), "[a]lthough the Service has had an opportunity to observe the performance of employees while they were working non-sensitive positions, this provides scant basis on which to evaluate their integrity and reliability should they be assigned to work in sensitive positions."

[29] Moreover, it is by no means clear that the alternatives proposed by petitioners and the amici supporting them are truly "less intrusive." "[O]n-going observation by * * * supervisors and co-employees" (Pet. Br. 35) could well promote a less private workplace. "Motor coordination tests" and "neurobehavioral tests" (ACLU Br. 20), whatever their efficacy, are almost assuredly more invasive than drug tests. See also Baker, Letz, & Fidler, *A Computer-Administered Neurobehavioral Evaluation System for Occupational and Environmental Epidemiology*, 27 J. Occupational Med. 206, 211 (1985) (cautioning that neurobehavioral testing may discriminate against certain groups). Moreover, neither workplace observation nor behavioral tests address the problem of an employee whose off-duty drug use has not affected his on-duty performance but may have rendered him susceptible to bribery or blackmail.

* * * * *

In sum, the Customs drug-testing program is reasonable. Because the program applies only to applicants for sensitive positions; because the program is a reasonable incident of an ongoing employment relationship; because the program offers applicants advance notice that they will be subject to such tests; because the program applies without discretion to all such applicants; and because the program is conducted under carefully circumscribed procedures that minimize the potential for embarassment or abuse, the intrusion on individual expectations of privacy is minimal. At the same time, the program advances governmental interests of the highest order—protecting the efficient performance, integrity, and reputation of an agency that serves at the front lines in the struggle against illegal drug use. Certainly, employee drug testing is no panacea; it cannot be expected to solve by itself the overwhelming problems of drug abuse that afflict this Nation. But employee drug testing—when rationally imposed and reasonably conducted—has the potential of being one important tool in that effort. And as this case demonstrates, a drug-testing program that meets those criteria of reasonableness is fully consistent with the requirements of the Fourth Amendment.

And as the court of appeals explained, detailed background investigations, which petitioners also endorse (Pet. Br. 35), may themselves be "intrusive invasions of an individual's privacy" (Pet. App. 18a). See *Fraternal Order of Police* v. *City of Philadelphia*, 812 F.2d 105 (3d Cir. 1987) (constitutional challenge to questionnaire given to police officers volunteering for special investigations unit).

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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REPLY

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Petitioners

v.

WILLIAM VON RAAB, COMMISSIONER,
UNITED STATES CUSTOMS SERVICE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF

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REPLY BRIEF

1. It is worth remembering that it is law-abiding citizens who are before the Court in this case. They do not seek to suppress incriminating evidence. They do not pose the question whether a Customs officer caught in possession of marijuana may keep his job. Rather, they object to urine tests on the same grounds that the colonists objected to searches by the Crown under general warrants and writs of assistance. The primary characteristic of those warrants, "so odious to the Constitutional Framers, and which the Fourth Amendment was expressly designed to curb, was precisely 'their indiscriminate quality, their license to search Everyman without particularized cause'." [1]

Petitioners assert, therefore, that the Fourth Amendment, a "device for protecting the innocent," [2] was created to protect citizens in precisely petitioners' circumstances.[3] That these petitioners should have rights inferior to those of persons actually suspected of criminal activity would be, they believe, intolerable.[4]

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[1] Jacobs and Strossen, *Mass Investigations Without Individualized Suspicion: a Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. Davis L. Rev. 595, 663 (1985) (hereinafter *"Mass Investigations"*), *quoting Wilkes v. Wood*, 19 Howell St. Tr. 1153, 1167 (1763).

[2] *See* Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 1229 (1983).

[3] *See* Herman, *Warrants for Arrest or Search: Inspecting the Allegations of a Facially Sufficient Affidavit*, 36 Ohio St. L. J. 721, 735 (1975).

[4] The government implies that petitioners conceded below that the government need not meet the probable cause standard before requiring public employees to submit to urine tests. Gov. Br. 10, n.11. This is not accurate. In this case, the government has undertaken to test without any degree of individualized suspicion. Petitioners have consistently argued that such suspicionless testing is unconstitutional. Although it has been unnecessary for petitioners to establish that probable cause would be required, petitioners have always taken the position that the serious intrusion wrought by

2. The government ridicules the belief of Customs employees that they would feel embarrassed or offended by their employer's demand that, despite their unblemished records, they provide further assurances that they do not use illegal drugs by urinating in a highly controlled environment and surrendering their urine for chemical analysis. The government asserts that undergoing a drug test is no more intrusive than a typical employee's "ordinary daily experience" when using a public restroom, or a routine medical examination that some employees are required to undergo as a condition of employment. Gov. Br. 28-30.

To some extent, intrusiveness is in the eye of the beholder. However, to suggest that, at most, employees might feel only "momentary self-consciousness" (Gov. Br. 28) at the collection process is to close one's eyes to common experience in our society. If other persons pay explicit attention to us while we urinate, whether in a public restroom or in a "collection site," the process can be profoundly embarrassing or offensive. When that observation takes place in the aura of the employer's distrust, and under fear of either false identification as a drug user or disclosure of private medical conditions, those feelings are likely to be heightened.[5] Just because the

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drug testing requires that traditional Fourth Amendment standards be met. The government, in turn, has never attempted to show why those requirements could not be satisfied.

[5] The plethora of challenges brought by apparently law-abiding employees against these testing programs is some testament that the tests are widely regarded as offensive. Indeed, some 42 Justice Department lawyers successfully challenged the Department's own drug testing program for precisely that reason. *Harmon v. Meese*, No. 88-1766 (D.D.C. July 29, 1988). The court, in striking down the program, relied on precedents variously holding the tests "offensive to human dignity and degrading," *Railway Labor Executives Ass'n v. Burnley*, 839 F.2d 575, 586 (9th Cir. 1988), *cert. granted*, 108 S.Ct. 2033 (1988), and "embarassing and humiliating," no matter how courteously or professionally conducted, *AFGE v. Meese*, No. C-88-1419, slip op. at 10-11 (N.D.Cal. June 16, 1988); *see Harmon v. Meese*, slip op. at 10-11.

degree of intrusiveness cannot be weighed, measured, or Socratically analyzed, does not mean that common experience may be ignored.[6]

In fact, undergoing a urine test is not at all like using a public toilet or taking a routine medical examination. Under the Customs program, employees do not provide their urine samples in medical facilities, and the procedure is overseen by lay, even inexperienced, "collection site persons," not by physicians or medical personnel. Moreover, and more importantly, the procedure is conducted like an investigation of misconduct, in an adversarial atmosphere, and not like a medical examination, in an environment of confidentiality and mutual trust. The collection site person "closely observes" the employee while he or she urinates and, under the new HHS guidelines, is directed to note "unusual behavior" and record it in a permanent record book. Further, the monitor now has the authority, with the concurrence of his or her supervisor, to require the employee to produce the urine sample under *direct* observation, where he or she has "reason to believe that a particular individual may alter or substitute the specimen to be provided."[7]

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[6] The Court's observations in *O'Connor v. Ortega*, 107 S.Ct. 1492, 1498 (1987), regarding the "operational realities of the workplace," do not support the government's argument that the employment context in which the urine tests are conducted diminishes Customs employees' privacy expectations. *See* Gov. Br. 19-20. In *O'Connor*, the plurality noted a diminished expectation of privacy in desks and filing cabinets because one of the "operational realities" of the workplace is that during the course of the day other employees or supervisors may enter desks and filing cabinets for work-related reasons unrelated to the investigation of misconduct. 107 S.Ct. at 1500-1501. However, no similar operational reality exists to diminish employees' expectations of privacy in their own personal possessions or in their bodies.

[7] *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, 53 Fed. Reg. 11970 (1988), Sections 2.2(f)(8), (16), (23). The HHS regulations, which impose qualifications requirements on the personnel that actually conduct the chemical analysis of urine samples, do not require collection site persons to possess any particular training or qualifications. In addition, the regula-

On the other hand, where urinalysis is employed by medical professionals, the production of the sample is not observed closely, directly, or in any way, because the procedure is not viewed as an examination into moral fitness and wrongdoing, but as an effort to assess physical fitness. In contrast, drug tests tell us nothing about physical condition; they cannot measure impairment of function, frequency of use, time of use, or even whether the use was medically prescribed. Instead, drug tests constitute a form of chemical surveillance of private off-duty conduct.[8] Indeed, the Customs Service's avowed

tions do not define or even give examples of the kinds of "unusual appearance or behavior" that should be permanently recorded and serve as the justification for directly watching employees while they pass urine. *See* 53 Fed. Reg. 11973 (1988).

[8] The government contends that "the fact that urine specimens are tested *only* for the presence of illegal narcotics eliminates any claim that the process of analysis itself intrudes on any legitimate privacy interests." Gov. Br. 32 (original emphasis). This contention is patently meritless. First, urine tests cannot distinguish between the legitimate and illegitimate use of controlled substances, so that the process of analysis necessarily reveals entirely legitimate and highly private information. Even employees who decline to reveal "all medications" to the collection site person upon request at the time they produce their samples (*see* Pet. Br. 4-5), will be identified and revealed by a confirmed positive test when they are taking the searched-for drugs under prescription.

Second, privacy is invaded because Customs is seeking evidence of misconduct off-duty, where an employee can reasonably expect the government not to venture. *See Jones v. McKenzie*, 833 F.2d 335, 339 (D.C. Cir. 1987), *cert. pending*, No. 87-1706 (filed April 15, 1988) (urine tests "provide the government with a periscope through which they can peer into an individual's behavior in her private life, even in her home"); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 589 (N.D. Ohio 1987) (comparing analysis of urine with entry into employee's home); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1511 (D.N.J. 1986) (drug testing "is George Orwell's 'Big Brother' society come to life"). In fact, under the Civil Service Reform Act, Congress has explicitly prohibited the government from inquiring into and disciplining employees for off duty misconduct—even illegal conduct—unless it can prove a nexus between the off duty misconduct and job performance. 5 U.S.C. 2302(b)(10); H.R. Rep. No. 1717, 95th Cong., 2d Sess. 131 (1978); *see also Doe v. Hampton*, 566 F.2d

primary purpose for instituting its program is to investigate and assure moral, and not physical fitness.[9]

3. Should a Customs employee selected for promotion refuse to submit to the drug test, he or she loses the promotion, but is not dismissed from the Customs Service. The government extensively features this aspect of the Customs program in its brief, arguing variously that it either renders the urine tests "consensual" or so dramatically reduces employees' expectations of privacy as to raise the question whether the urine tests are governed by the Fourth Amendment at all. Gov. Br. 21-24.[10] These

265, 272, n.20 (D.C. Cir. 1977) (noting that the "nexus" requirement "serves to minimize unjustified governmental intrusions into the private activities of federal employees").

[9] Notwithstanding the universal view of the lower courts to the contrary, the government also suggests that no search is involved at all in this case. Gov. Br. 24-25, n.18. It argues that urinalysis is just another pre-employment "fitness" test, like fingerprint checks, background investigations, and polygraphs, none of which raises Fourth Amendment concerns. *Id.*

The government's argument proves too much. Under its reasoning, no constitutional restraints exist on the government's authority to investigate employees' fitness for duty, so long as the employees have notice of the government's intentions and the search is job related. Thus, here for example, the government could require all applicants to submit to searches of their homes, or review of their diaries to hunt for evidence of misconduct or criminal activity.

Contrary to the government's contention, we see no reason why the pre-employment testing devices the government cites could not be challenged on constitutional grounds if improperly used. *See e.g., Hester v. City of Milledgeville*, 777 F.2d 1492 (11th Cir. 1985) (constitutional restrictions on use of polygraph); *Fraternal Order of Police v. Philadelphia*, 812 F.2d 105 (3d Cir. 1987) (restrictions on background investigations). The fact that a procedure is implemented as part of an investigation of an employee's fitness does not neutralize the Constitution.

[10] Of course, it is quite true that the next step Customs contemplates (Gov. Br. 37, n.26)—requiring covered employees to submit to surprise random urine tests as a condition of keeping their current jobs—is even more intrusive than the current program. A number of such random testing plans, including several imple-

arguments suggest a theory of "consent" that will not square with this Court's decisions.

First, because refusal to submit to the urine test unquestionably results in a significant penalty to employees —disqualification from a government job and loss of the opportunity for career advancement at the Customs Service—consent to these searches cannot be said to be freely and voluntarily given within the meaning of this Court's Fourth Amendment jurisprudence, as the government implies (Br. 22-23). *See e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 228-229 (1973). An employee's consent to a search cannot be termed voluntary when it is given "under threat of substantial economic sanction." *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973).

As this Court's decisions in the context of public employment make clear, conduct under duress or coercion always involves choice, but where one must choose between the "rock and the whirlpool," or between the lesser of two evils, one does not freely consent. *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967), *quoting Union Pacific R.R. Co. v. Public Service Commission*, 248 U.S. 67, 69-70 (1918). One who must choose between taking a test offensive to him and giving up a remunerative or prestig-

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mated by federal agencies pursuant to Executive Order 12564, have been recently held unconstitutional and/or preliminarily enjoined. *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir. 1988) (police officers), *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988), *reh'g granted*, August 3, 1988 (firefighters); *Harmon v. Meese*, No. 88-1766 (D.D.C. July 29, 1988) (attorneys and other employees at the Department of Justice); *American Federation of Government Employees v. Meese*, No. C-88-1419 (N.D. Cal. June 16, 1988), *stay denied*, No. A28 (July 26, 1988, O'Connor, J.) (employees of the Federal Bureau of Prisons); *Hanson v. Turnage*, No. C-88-20361 RPA (N.D. Cal. September 12, 1988) (employees of the Veterans' Administration); *Quadros v. Reagan*, No. C-88-1764 RHS (N.D. Cal. August 22, 1988) (employees of the National Weather Service); *but see, Policeman's Benevolent Association v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988) (upholding random testing of police officers).

ious position is coerced, as the district court properly found.[11]

If the Customs program is reasonable in Fourth Amendment terms, then presumably the employee's consent is not required. If it is, as we urge, unreasonable, then consent exacted at the price of remunerative promotion cannot render the search reasonable.[12] Otherwise, this Court's Fourth Amendment rulings could be circumvented by the simple expedient of withholding necessary or desirable benefits to those who refuse to consent to otherwise unreasonable searches.[13]

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[11] Pet. App. 53a; *see* Aff. of Lee Cruz, J.A. 56. The court of appeals did not reverse this finding, but made the rather puzzling observation that the test is, "to some extent, consensual," although it noted that the consent was "exacted" from employees. Pet. App. 14a-15a. In the usual consent case, the government must prove that consent was in fact voluntarily given under all the circumstances. *Schneckloth v. Bustamonte*, 422 U.S. at 248-249. No such proof was attempted here, nor could it reasonably be done on a blanket consent basis.

[12] "The theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967); *see also, Lefkowitz v. Turley*, 414 U.S. 70; *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Garrity v. State of New Jersey*, 385 U.S. 493. Thus, the lower courts that have considered the issue have unanimously rejected the argument that employees "consent" to urine tests or other searches merely by seeking or maintaining government employment. *Railway Labor Executives Association*, 839 F.2d at 589; *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302, 1310 (8th Cir. 1987); *Feliciano v. City of Cleveland*, 661 F. Supp. at 592; *cf. Fraternal Order of Police, Lodge 5 v. Philadelphia, supra*, 812 F.2d at 112 (government cannot condition employment on waiver of constitutional right to privacy).

[13] *Wyman v. James*, 400 U.S. 309 (1971), does not support a different result here. Gov. Br. 23-24. In that case, the Court upheld a statute requiring periodic "home visits" as a condition for continuation of public assistance. The Court stressed that the visitation does not equate with the traditional "search," but that it was, in any event, reasonable. In particular, the Court noted that the

4. The government maintains that the elimination of official discretion in the conduct of the Customs program minimizes its intrusiveness. Gov. Br. 25-26. This observation, however, puts the cart before the horse. Under the Fourth Amendment, governmental intrusions into personal privacy are minimized as a matter of first resort by requiring the government to target its intrusive activity towards those most likely to be guilty, not by conducting dragnet searches of the presumptively innocent. Even eliminating all official discretion in the conduct of the search will not compensate for the vast intrusion on all innocent employees occasioned by ignoring the particularized suspicion requirement. As this Court has recognized in the context of vehicle stops, the Fourth Amendment analysis "must take into account the overall degree of interference with legitimate traffic." *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976), *citing United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975). Thus, this Court, as we have argued, has always required the government to meet a heavy burden before permitting departure from the particularized suspicion requirements.

That burden has not been met here. The government has failed to cite a single decision of this Court upholding an intrusion of the magnitude involved here, in the absence of any particularized suspicion. Indeed the cases it does rely on (Gov. Br. 19) involved exceedingly limited

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public's interest is in the dependent child, and may not be subordinated to the parent's privacy concern, and that the purpose of the visit is assistance and rehabilitation, not investigation of wrongdoing. The peculiar needs of the welfare system underlie that case. Here, in contrast, the government's sole purpose is investigative, as it is in any other Fourth Amendment case, criminal or civil. The program's *raison d'etre* is to detect, penalize and deter misconduct. Similarly, *Zap v. United States*, 328 U.S. 624 (1946), *vacated*, 330 U.S. 800 (1947), is distinguishable in that it is more analogous to the commercial premises inspection cases discussed in our opening brief at 33-34. These cases do not address the reasonableness of more intrusive and personal searches like the drug tests at issue here.

intrusions, and largely undermine the government's argument. For example, in *Martinez-Fuerte*, the intrusion was a brief stop, without a search, of automobiles at a fixed checkpoint near the border, an area where privacy interests are traditionally at their nadir and government interests at their zenith. As we noted above, it was extremely important that the intrusion on innocent persons was minimal, suggesting the opposite result here. 428 U.S. at 558-59. Moreover, the government had documented an intractable law enforcement problem in *Martinez-Fuerte*, a burden it has failed to meet here. *See* Pet. Br. 43-44.

Similarly, in *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), the Court upheld the Customs officers' boarding of vessels to examine documents without particularized suspicion. The 200-year Customs history of such inspections, their nonpersonal nature, and the lack of any alternative means to achieve the necessary document inspection of a vessel, were all important features that distinguish that situation from the instant case. Indeed, the Court recognized that to stop and search an automobile at the border with the same purpose, without articulable suspicion, "would have run afoul of the Fourth Amendment." *Id.* at 588. Clearly the personal searches involved in the instant case are vastly more intrusive even than an automobile search.

5. Even accepting for the sake of argument the government's view that the Customs program only presents a moderate intrusion into personal privacy and dignity, its position is still untenable, for it has wholly failed to justify, on practicality grounds, its departure from the probable cause/particularized suspicion requirements.[14] In that regard, it urges that application of even

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[14] The government apparently believes that in order to justify an exception to the probable cause and reasonable suspicion requirements it need only show that "the privacy interests implicated by a search are minimal and * * * 'other safeguards' are available to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field'." Gov. Br.

a minimal individualized suspicion standard would unduly interfere with its ability to "*deter* wrongdoing, to *insulate* employees from threats to integrity, and to "*promote* the public reputation of the agency." *Id.* (original emphasis). It claims that "the margin of error associated with a probable cause or individualized suspicion standard is singularly unsuited to those ends." *Id.*

The government's rhetoric, however, is completely undermined by the facts of this case. Since Customs' workforce was already drug-free when the program was instituted, it seems abundantly clear that Customs has already largely succeeded, through other traditional employment devices, or legitimate investigatory techniques, in deterring misconduct, insulating employees from threats to their integrity, and promoting the public reputation of the agency. This Court's decision in *Delaware v. Prouse*, 440 U.S. 648 (1979), makes clear that proponents of broad, suspicionless searches cannot prevail merely by touting the gravity of a problem and asserting, without specific proof, that the searches provide a solution. *See Mass Investigations, supra* at 633ff. But that is precisely what the government has attempted here.[16]

37-38, *quoting New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985). This statement of the law and of the government's burden is incorrect. Even for a minimally intrusive search, the government must first show that the "balance of interests *precludes* insistence upon 'some quantum of individualized suspicion'." *Delaware v. Prouse*, 400 U.S. at 654, *quoting United States v. Martinez-Fuerte*, 428 U.S. at 560 (emphasis added).

[15] Professors Jacobs and Strossen persuasively demonstrate that the mass dragnet technique (they focus on roadblocks to deter drunk driving), aimed "not at detecting identified or suspected offenders, but instead at turning up previously unidentified and unsuspected offenders, and at deterring future unlawful conduct," constitutes a marked departure from previous law enforcement practice. *Id.* at 660-662. Instead of a roadblock set up, for example, to apprehend a fleeing felon, it is as if the police decided to "cordon off all roads surrounding all banks to check motorists for evidence of bank robberies not specifically known to have been committed, but statistically likely to occur." *Id.* at 661. This dragnet technique could readily be extended to other pressing law enforcement problems.

Moreover, the Customs Service submitted no evidence in this case to demonstrate that adhering to traditional Fourth Amendment standards would present a formidable obstacle to achieving its goals of deterring wrongdoing, insulating employees from threats to integrity, or promoting the agency's public reputation. A number of courts have concluded that the existence of other alternatives—such as background investigations, on the job observation, or tips from the public—will at least enable the government to target those likely to be engaging in misconduct, thereby obviating the need to test masses of innocent employees without particularized suspicion. *See* cases cited in Pet. Br. at 35.[16]

Indeed, the only evidence produced on the comparative utility of the Customs program was produced by *petitioners*. They submitted evidence, undisputed in the record, that the drug testing program Customs has fashioned would be completely ineffective, because it can be foiled by simple abstinence or by drinking large quantities of fluids.[17] The court of appeals ignored this evidence, as does the government in its brief, preferring to rest on the speculative "deterrent" effect of the Customs program on employees who use illegal drugs, an effect

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But general searches of citizens on "mere chance of uncovering wrongdoing" was precisely the evil the Founders intended to bar. *Id.* at 663.

[16] The government would have this Court nonetheless find as a matter of *fact* in this case that it cannot rely upon other devices to pinpoint those employees likely to be using drugs. Gov. Br. 39-40. However, it introduced no evidence to support those factual conclusions in the courts below. It would not be appropriate at this stage in the proceedings for this Court to find "facts" the government made no attempt to prove below. The court of appeals went that route, and, as a result, made factual errors. *See* Pet. 9, n.12.

[17] *See*, Pet. Br. 8-9 & n.12; 46-47 & n.38; *see also* Montagne, Pugh, and Fink, *Testing for Drug Use Part 2: Legal, Social, and Ethical Concerns*, 45 Am. J. Hosp. Pharm. 1509, 1516 (1988) (noting that many of those tested in the workplace have temporarily abstained from use in order to avoid detection and that methods for escaping detection are widely publicized).

disputed by plaintiffs' experts. The putative deterrent can, of course, never be measured, since there was no observed problem to deter."[18]

Finally, Customs' "margin of error" argument (Gov. Br. 38) is wholly offensive to the values underlying the Fourth Amendment. Customs, in effect, seeks guarantees that *any* and *all* illegal drug use by covered employees will be rooted out or deterred, before it will limit its demands for employee urine samples to those for whom particularized suspicion exists. Even if more guilty employees would escape detection under a particularized suspicion standard (a far from self evident proposition), it is a result the Fourth Amendment requires. The particularity requirement of the Fourth Amendment, in balancing individual rights against the government's need to enforce the law, assumes that not all wrongful conduct will be discovered or averted. That is obviously the price of a free society, a price that is relatively modest in this case, where all indications are that Customs had already largely achieved its goals before it implemented its program.[19]

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[18] We emphatically reject the lower court's suggestion—echoed by the government here—that we are contending that "the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy." Gov. Br. 37, n.26, quoting Pet. App. 19a. A more invasive program—one for example that required the random testing of current employees—might or might not be more effective than the Customs program. However, it would suffer the same fatal flaw as the current program for it would not comport with the Fourth Amendment's particularity requirement. Moreover, a program that is "more pervasive and more invasive of privacy" would presumably require an even greater governmental justification. As Judge Hill observed in dissent below, "such a program will also have to be judged on its own merits." Pet. App. 27a, n.3.

[19] The government's "margin of error" argument is not only offensive, it is hypocritical as well, because it presupposes a testing program that will itself have no margin of error. This is a ludicrous notion, both for the reasons we have outlined above and because urine testing programs always miss many true positives. True positives necessarily escape the government's net because it is required

6. Despite its failure to make any showing here that it is responding to an existing or even reasonably anticipated problem, the government nonetheless asserts that three compelling interests justify its program.[20] First, the government contends that the drug testing program promotes "the safe and efficient discharge of Customs operations." Gov. Br. 33-34. However, the government provided absolutely no evidence in the lower court to show that its program had any significant nexus to this concern or would make even a marginal contribution to this goal. Drug tests cannot measure present intoxication or impairment, much less predict employees' sobriety at some time in the future, after they are on the job.[21] A negative result on a pre-employment drug test that can be thwarted by temporary abstinence, provides scant re-

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to set relatively high cut off levels in the laboratory to avoid false positives. *See* J.A. 64, Affidavit of Arthur McBay, para. 6; 53 Fed. Reg. 11976 (noting that "a negative report [from the laboratory] does not signify the absence of a particular drug but only that the particular drugs or metabolites screened for were not detected at a specific concentration").

[20] We note here that the government liberally cites to Commissioner von Raab's affidavit as the primary source for the underlying justifications for the Customs program. Gov. Br. 2, 3, 4, 33, 34. That affidavit, however, was not before the district court on the merits, but was submitted *post hoc* in an unsuccessful attempt to obtain a stay of the district court's decision. *See* Pet. Br. 7, n.10.

[21] Certainly, a positive result on a urine test has even less probative relationship to on-the-job impairment than the traces of marijuana and marijuana smoke found in a car parked in the company parking lot in *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987). In that case this Court observed:

> "the assumed connection between the marijuana gleanings found in Cooper's car and Cooper's actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy identified by the court of appeals against the dangerous operation of machinery by persons under the influence of drugs or alcohol."

108 S.Ct. at 373; *see also id.* at 375 (Blackmun, J., concurring).

assurance that those employees with public safety responsibilities will report to work unintoxicated.

In any event, the government has already conceded elsewhere that the safety-efficiency rationale it now features in its brief was not the primary basis for the Customs program.[22] As it noted in its petition for certiorari in *Burnley v. Railway Labor Executives' Association*, No. 87-1555, at pp. 19-20, under the Customs program, "the primary governmental interest relates to the danger that those who *use* illicit drugs, whether or not they are impaired on the job, may be susceptible to corruption or blackmail" (original emphasis). Thus, the government's primary rationale for its program appears now to be that, by screening out drug using employees, it "promotes the integrity of Customs operations" and "ensures that its employees do not damage the agency's public reputation." Gov. Br. 34-36.

Of course, as we have explained in our opening brief (at 40), these abstract rationale could justify the routine testing of a broad range of public employees, from judges to high level managers to low level employees. Moreover, the integrity argument proves too much in another sense. Employees may be subject to blackmail or bribery for any number of reasons aside from the use of illegal drugs. Similarly, any number of private and otherwise unknown off-duty activities could damage the agency's public reputation if they became a matter of public knowledge. Because Customs has absolutely no basis for believing that use of illegal drugs is a problem among its employees (and good reason for expecting the contrary), its drug-testing program bears an insufficient nexus to its general interest in promoting the integrity of its operations or its own public reputation. While Customs'

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[22] It should be noted that few of the covered positions involve the carrying of firearms or otherwise implicate public safety. Most of those covered appear to be included because their positions are considered otherwise "sensitive" by the Customs Service. J.A. 37-39.

interest in ensuring that its employees obey the law and do not damage the agency's reputation may be important enough to justify the discipline of employees who are discovered to be using illegal drugs, it is quite another thing to say that it justifies new and intrusive measures to ferret out such use when there is no particular reason to believe it is occurring.

7. In the face of the record in this case, which fails to support the need for *any* drug testing program at the Customs Service, the government and the *amici* on its side would like this Court to view this case through the lens of the escalating concern over the use of illegal drugs in our society. This Court, however, should emphatically reject the invitation to substitute rhetoric concerning the drug problem in society for an examination of Customs' failure to show any need to institute this or any other testing program.

a. No one would deny that illegal drugs represent a serious law enforcement problem. However, the now widespread popular impression that American *workplaces* are in the throes of a drug epidemic, requiring increasingly severe counter-measures by both private and public employers, is unsubstantiated by reliable proof. Whatever drug problems there are in society, there is virtually no hard evidence documenting a problem on the job.

Thus, national statistics demonstrate that the number of adults who currently use illegal drugs peaked in 1979 and has been generally on the decline since then. Among 18-25 year olds, current use of marijuana declined from 35.4% of the population in 1979 to 21.6% in 1985, and cocaine use declined from 9.3% to 7.6%. Among older adults (age 26 and over), the number of users of marijuana declined from 6.5% in 1982 to 6.1% in 1985. While the number of cocaine users increased slightly, by less than a percentage point, between 1982 and 1985, the overwhelming majority of older adults (98%) were not currently using cocaine in 1985. Significantly, a recent

survey of high school seniors showed declines in the use of both marijuana and cocaine.[23]

Nonetheless, a variety of rather startling claims, supported by anecdotes, "statistics," and pseudo-scientific surveys, are persistently repeated in the popular press and by proponents of drug-testing, especially the drug testing companies themselves. A brief examination of only a few of the most oft-repeated claims, contained in the briefs of the government and some of the *amici* on its side, casts significant doubt upon their reliability and the credibility of their proponents.

One claim made by several of the *amici* in this case, states that "between ten percent and 23 percent of all U.S. workers use dangerous drugs on the job."[24] On its face, the claim that up to one in four workers in this country use dangerous drugs on the job seems absurd and contrary to common experience (even if the statistic includes the use of alcohol and prescription drugs).[25] In

[23] *See* Morin and Allen, "Are We Shooting Ourselves in the Foot in the War on Drugs?," *Washington Post*, Section C, p. 4 (June 26, 1988). The statistics on the extent of drugs used by the adult population are taken from the 1985 NIDA National Household Survey. Most of the *amici* also rely upon statistics from this survey in their briefs. In interpreting the statistics it is important to distinguish between those statistics that show use sometime in the respondent's life, use in the past year, and use in the past month. NIDA considers only use in the past month to reflect *current* use of illegal drugs. Figures concerning lifetime use, or use in the past year, includes use that has stopped.

In addition, the NIDA statistics do not purport to measure which among the individuals who currently use illegal drugs, use them chronically, as opposed to infrequently. One court has found, on the basis of expert testimony, that less than 10% of those who use illegal drugs do so chronically, and that less than 3% of the workforce abuses drugs other than alcohol. *Taylor v. O'Grady*, 669 F. Supp. 1422, 1427 (N.D. Ill. 1987).

[24] *Brief for the Chamber of Commerce of the United States*, at 5; *Brief Amicus Curiae of the California Employment Law Council*, at 5-6; *Brief of the College of American Pathologists*, at 2-3.

[25] It is well-established that the use of alcohol and prescription drugs poses a far greater threat to the health and well-being of the

fact, the source for the "statistic," given in the Brief of the U.S. Chamber of Commerce at p. 5, n.9 is the NIDA publication *Strategic Planning for Workplace Drug Abuse Programs*, at p. 4.[26] That widely cited publication does not base its conclusions upon scientifically accepted studies, but upon hearsay. It notes that its overview of the impact of drug abuse in the workplace "summarizes statistics and interpretations that have been widely quoted in the business and popular press over the last two years." The original source of this claim is shrouded in mystery.

Similarly, other extravagant and imprecise claims are made about the productivity and absentee, accident, and tardiness rates of the "drug abusing employee" without any scientific foundation, or without making distinctions as to whether the drug of abuse is an illegal one, or alcohol. *See* Gov. Br. at 34.[27] Though these claims refer to objective, observable phenomena, there is no scientific data to suggest they have ever actually been studied in the workplace. These claims are particularly puzzling given the recognition by the Department of Health and Human Services that necessary research has still not been done and that, in fact, "very little is known about the complex relationship which undoubtedly exists between drug abuse, worker performance and productivity or lack thereof, and how the work setting influences or is influenced by drug abuse." *Drug Abuse and Drug Abuse Research, First in a Series of Triennial Reports to Congress from the Office of the Secretary*, Department of

American worker than the use of illegal drugs, if only because the former are much more widespread. *Taylor v. O'Grady*, 669 F. Supp. at 1427; Dennenberg & Dennenberg, *Drug Testing From the Arbitrator's Perspective*, 11 Nova L. Rev. 371, 373-374 (1987).

[26] The other *amici* merely cite the Employer's Guide put out by the Chamber, presumably based on the same faulty "evidence."

[27] *See also Brief Amicus Curiae of the Chamber of Commerce*, at 6; *Brief of the American College of Pathologists*, at 3; *Brief Amicus Curiae of the California Employment Law Council*, at 6.

Health and Human Services, DHHS Publication No. (ADM) 85-1372 (January, 1984) at 26.[28]

Perhaps the most frequently cited and most misleading figure, which appears in the decision of the court of appeals below, places a dollar figure on the annual "cost" to American business in terms of lost productivity caused by drug abuse. Pet. App. 2a ("Employee drug use costs the United States an estimated $33 billion per year").[29] The figure, which appears in virtually every published discussion of drug use in the United States, comes from a 1983 study conducted by the Research Triangle Institute.[30] The study attempted to document a relationship between productivity and drug use by comparing the incomes of households that contained one member who had, at some time in his or her life, smoked marijuana for thirty consecutive days, with the incomes of other house-

[28] Steve Gust, research director for the office of workplace initiatives at the National Institute of Drug Abuse has stated that he "cringe[s] every time [he] hears some of those numbers." Gust has stated that he knows of only one study suggesting a statistically significant link between drug use and employment problems—a study showing that men in their 20's who smoke marijuana heavily change jobs much more often than those who do not. Matlack, *Boardroom Vice Squads*, National Journal (June 25, 1988) at 1682. *See also* "Doctor Sees Few Proven Links Tying Substance Abuse, Accident Rates," 25 Government Employee Relations Report 1486 (October 26, 1987) (observing that studies of the relationship between drug use and occupational accidents "generally exhibit inconsistent definitions, poor documentation of the substance said to have been abused, variation in environmental risks, and lack of control groups").

[29] *See also Brief Amicus Curiae of the Chamber of Commerce*, at 6 (estimating costs in excess of $25 billion); *Brief of Amici Curiae Washington Legal Foundation, et al.*, at p. 2 (estimating cost at $60 billion); *Brief of the American College of Pathologists*, at p. 3 (estimating costs at $60 billion). None of these estimates is documented, nor are the huge differences between them explained.

[30] Harwood, H.J.; Napolitano, D.M.; Kristiansen, D.L.; Collins, J.J., *Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness*, Research Triangle Institute, June, 1984 (hereinafter "RTI Study").

holds.[31] It found the marijuana's smoker's household had a lower income.[32] The study equates lower income with lower "productivity," and it concluded that employers lose 25.7 billion dollars of this productivity each year.[33]

Even if lower incomes were an appropriate measure of decreased productivity in American society, they have nothing to do with the actual costs of current drug use to American employers in terms of measurable items like absenteeism, health care costs, accidents and so on. In fact, the study itself could not find any impact on income based upon *current* drug use, and acknowledged that it could not even establish any causal relationship between past marijuana use and lower income.[34] It is perhaps for these reasons that the current director of alcoholism and drug abuse research at the Research Triangle Institute has publicly acknowledged that the study is being widely misused by those who claim that it shows the extent of business losses suffered because of drug use.[35]

b. We do not critique these studies because we believe that use of illegal drugs is not an important national problem or because we believe that current levels of use are acceptable. Obviously, the employees that petitioners represent recognize the serious law enforcement problems generated by illegal drug use and highlighted in the government's brief (at 3-4; 32-33). However, it is considerably less certain that it is appropriate or effective to target the workplace as the primary battleground for the "war on drugs."

It is ironic that as objective measures show drug use in decline among members of American households, the pitch of the rhetoric has gone up several octaves. Indeed, polls show that segments of the public are ready to accept, not only widespread urine testing of public and

[31] RTI Study at A7-A8; A19-A24.

[32] *Id.* at A24.

[33] *Id.* at A3.

[34] *Id.* at A24-A26.

[35] Matlack, *supra*, n.28, at 1682.

private employees, but other startlingly harsh measures including random searches of cars, lockers, and homes, to respond to the perceived drug crisis.[36]

As we noted in petitioning for certiorari, the resolution of the constitutionality of public employee urine testing programs will be decided in a highly charged atmosphere that demands resolute fidelity to traditional Fourth Amendment principles. The government must not be relieved of its burden of justifying departure from Fourth Amendment principles by reference to "the pernicious impact" of illicit drugs on American society. *See* Pet. App. 12a. This Court should reaffirm the applicability of those principles to employee drug testing programs, by striking down the Customs program.

CONCLUSION

The decision of the court of appeals should be reversed.

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[36] *See*, Morin and Allen, *supra*, n.23, *Washington Post*, Section C, p. 1, col. 1. The Washington Post Poll showed that of 1,012 randomly selected adults polled, 54% favored allowing the police to randomly stop and search automobiles and 34% agreed that it would be appropriate to "allow police to search without a court order the houses of people suspected of selling drugs, even if the houses of people like you are sometimes searched by mistake." *Id.* at C4. *See also* "New York Times/CBS News Poll," *New York Times*, D16, col. 2-3, 5-6 (September 2, 1986) (72% of those surveyed willing to submit to request by their employer that all employees be tested to determine recent illegal drug use). Of course, what the respondents say in the abstract and what they say when confronted by a demand to submit to a search may be entirely different things.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
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No. 86-1879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION, and
ARGENT ACOSTA, PRESIDENT, CHAPTER 168,
NATIONAL TREASURY EMPLOYEES UNION,
Petitioners,

v.

WILLIAM VON RAAB, COMMISSIONER,
UNITED STATES CUSTOMS SERVICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE COALITION OF CALIFORNIA UTILITY WORKERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF COALITION OF CALIFORNIA UTILITY WORKERS

In letters filed herewith, the parties have consented to the filing of this brief.

The Coalition of California Utility Workers ("Coalition") is an amalgam of labor organizations whose mem-

bers are employed by investor-owned public utilities in the energy and communications industries regulated by the California Public Utilities Commission. The 26 local unions and district councils participating in the Coalition are drawn from five international unions. The combined membership of the Coalition's participating organizations exceeds 130,000.

Participants in the Coalition have considerable experience with the development and administration of the drug and alcohol abuse prevention, detection, and rehabilitation programs affecting the employees they represent, including so-called "safety-sensitive" employees. In many cases, these programs are the product of successful collective bargaining.

The Coalition's experience has shown that programs using widespread urinalysis as a first resort are perceived to be highly intrusive by the affected employees, produce an inordinate number of false results, exacerbate tensions between labor and management, and, in short, are perhaps the least effective and most objectionable method of attacking the problem of employee drug abuse. The Coalition urges that less intrusive, more effective alternatives are available and that they must be investigated, applied, and exhausted before a public or quasi-public employer may resort to drug testing. Furthermore, even if less intrusive alternatives when used alone are insufficient, the Fourth Amendment requires that drug testing be based on reasonable cause, including individualized suspicion, to believe the test will produce evidence of misconduct.

This proceeding is of vital interest to the Coalition because the outcome may impede the ability of its participants to safeguard the rights and freedoms of the employees they represent.

INTRODUCTION AND SUMMARY OF ARGUMENT

Drug abuse has had tragic consequences for our society; all parties to this proceeding agree that it must be eradicated. In our zeal to rid our nation of the effects of drug abuse, however, we must take care not to lose precious freedoms in the process. It would indeed be the ultimate tragedy to look back on history and realize that the single most pernicious effect of drug abuse on our nation was the incremental loss of constitutional protections enjoyed by the populace at large, the vast majority of which does not abuse drugs.

In this case, then, the parties do not dispute the compelling need to eradicate employee drug abuse, nor is there any question that government-imposed urinalysis constitutes a search for purposes of the Fourth Amendment. The dispute here is over the reasonableness of compulsory urinalysis in the absence of either an individualized, or even a generalized, suspicion of wrongdoing.

The Government, and the circuit court below, weighed heavily the potential risks associated with drug abuse and then struck the balance against individual employee rights. Those potential risks are not to be minimized, but the striking of a balance in the intensely intrusive context of urinalysis requires more than an active imagination. It is appropriate to conjure the potential for ultimate catastrophe—here, compromised drug enforcement agents. But the distinction between reasonable and unreasonable searches does not turn solely upon the *potential* for harm; rather, it requires careful analysis of such critical factors as the nature and scope of the existing problem, the relationship between the means selected and the governmental purposes to be served, and the availability of less intrusive means for achieving the desired end.

The Government's intrusion into interests protected by the Fourth Amendment must be justified at its inception

by reasonable grounds for suspecting that the search will turn up evidence. Then the search must be reasonably related in scope to the circumstances which justified the intrusion. Applying these standards, this Court historically has presumed that searches conducted in the absence of individualized suspicion are unreasonable, deviating from that presumption only where, because of the nature of the problem to be corrected, suspicion cannot be individualized. Where articulable grounds for identifying violators can be generated, no deviation from the individualized suspicion requirement has been permitted.

The Fourth Amendment not only requires individualized suspicion, based upon articulable grounds, it requires careful evaluation of the circumstances surrounding the search in order to determine whether less intrusive means are available to achieve the desired ends. Where such alternatives exist and they are effective, they must be employed in place of unnecessarily intrusive and thus unreasonable means.

The Government's urinalysis requirement here stems from no identifiable problem: no evidence is offered to suggest even a remote likelihood that the ultimate catastrophe envisioned will occur. Thus, urinalysis is not justified at the inception. Nor is urinalysis the least intrusive means to serve the Government's legitimate interest in the prevention of employee drug abuse. Professional and scientific literature attests to the effectiveness of less intrusive, direct observation techniques, through which articulable symptoms of drug abuse can be identified. Management training and the education of the work force are often more reliable and more effective techniques than drug testing. These and other alternatives must, at a minimum, be proved inadequate before more invasive methods may be employed.

The Government here did nothing more than hypothesize the most extreme potential catastrophe, and then

move directly to selection of the most exereme measure to minimize that potential. Having skipped over the step of full consideration of the alternatives between those extremes, the Government's choice of urinalysis is unreasonable.

ARGUMENT

I. The Government May Not Pursue Its Legitimate Interest In A Drug-Free Work Force Through Means Which Impinge Upon Its Employees' Fourth Amendment Rights.

Few activities in our society are more intensely private than the act of urination. Recognizing this self-evident truth, the circuit court below correctly held, in line with other courts to rule on the issue, that requiring public employees to submit to compulsory urinalysis constitutes a search within the meaning of the Fourth Amendment.[1] In proceeding to evaluate the constitutionality of the search, however, the court failed properly to balance the competing interests at stake.

The Fourth Amendment safeguards against "unreasonable searches and seizures." Determining the reasonableness of a particular class of searches requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *O'Connor v. Ortega*, —— U.S. ——, 107 S.Ct. 1492, 1499 (1987) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)); *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). Two factors inform this inquiry: First, the Court must determine "whether the [search] was justified at its inception." *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41

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[1] *See Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 580 (9th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3684 (U.S. March 17, 1988) (No. 87-1555), and cases cited thereat ("Every court that has considered the matter has similarly concluded that urine tests . . . are searches for Fourth Amendment purposes").

(1985) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). In other words, the Government must be able to point to "reasonable grounds for suspecting that the search will turn up evidence." *Id.*, 469 U.S. at 342. Second, the Court must evaluate "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 341. Thus, the means chosen must be "reasonably related to the objectives of the search and not excessively intrusive." *Id.* at 342.

The program of required urinalysis under review here fails this test of reasonableness in both respects. It does not meet the threshold requirement of justification, and it is unnecessarily intrusive in light of its intended purpose.

A. The Government's Urinalysis Program Does Not Require Articulable and Individualized Grounds for Suspicion and Is, Therefore, Unconstitutional.

This Court has held that a search conducted without individualized grounds for suspicion is presumptively unreasonable unless, because of the nature of the problem being addressed, those grounds cannot be identified on a case-by-case basis. Two decisions illustrate this principle.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court held that a warrant issued for an area-wide inspection by a municipal housing authority would be consistent with the Fourth Amendment even though the warrant did not articulate factors supporting probable cause to search a particular building. In reaching this result, the Court emphasized the fact that the agency's "decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building." *Id.* at 536. Since no other effective means to attack the problem of serious and widespread housing code violations could be shown, in part because

many of the violations were not observable, a warrant authorizing an area-wide inspection was deemed not constitutionally unreasonable. *Id.* at 536-37. The Court emphasized also that the inspections were not "personal in nature." *Id.*

In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), on the other hand, the Court struck down the practice of random stops by roving patrols near the Mexican border, concluding that the legitimate needs of law enforcement did not require this high degree of interference with lawful traffic. *Id.* at 883.

> "We are confident that substantially all of the traffic in [border] cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." *Id.* at 882.

Observing that "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators," the Court noted that "a requirement of reasonable suspicion for stops allows the government adequate means of guarding the public interests and also protects residents of the border areas from indiscriminate official interference." *Id.* at 883.

The facts of this case are similar to *Brignoni-Ponce*, and unlike *Camara*. Here, in contrast to *Camara*, the Government has not based its decision to conduct employee drug testing on any appraisal of conditions in its work force as a whole. To the contrary, the Government has conceded, and the court below recognized that, as in *Brignoni-Ponce*, substantially all the persons subject to

this search are innocent of wrongdoing. J.A. 10, 15, 19, 53. The testing program was instituted without any evidence of employee drug use either on or off duty, and in five months of testing not one current employee seeking a promotion produced a urine sample which tested positive for illicit drugs. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 173 (5th Cir. 1987), *cert. granted*, —— U.S. ——, 108 S.Ct. 1071 (1988).

Further, the effects of the evil the Government here seeks to avoid, illicit drug use, "tend to generate articulable grounds for identifying violators." *Brignoni-Ponce*, *supra*, 422 U.S. at 883. In *Camara*, the Court was concerned that most housing code violations occur within private premises and cannot be detected from outside. 387 U.S. at 537. Drug abuse, on the other hand, produces physical symptoms easily detected by an observer with minimal training. *See* discussion *infra* at 12-15. As in *Brignoni-Ponce*, a requirement of individualized suspicion would adequately safeguard the public interest in a drug-free Customs Service while protecting the employees' right to be free from unreasonable searches. Dispensing with the requirement of individualized suspicion is unwarranted and hence constitutionally unreasonable.

B. The Government's Resort to Required Urinalysis Is Unjustified and, Therefore, Constitutionally Unreasonable Because the End It Seeks to Promote Can Be Achieved Through Less Intrusive Means.

The paramount function of the Fourth Amendment is the protection of personal privacy against unwarranted intrusion by the State. *Schmerber v. California*, 384 U.S. 757, 767 (1966). "The importance of informed, detached, and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Id.* at 770. Such determinations require careful weighing of the intrusion on the individual's Fourth Amendment interests against the promotion

of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

Although "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means," *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983), it is also true that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968); *see also Sibron v. New York*, 392 U.S. 40, 65 (1968); *Chimel v. California*, 395 U.S. 752, 762 (1969). If less intrusive means are available which adequately protect the governmental interest involved, they must be employed. In its efforts to cure a social ill, the Government must try a scalpel before using a bludgeon where constitutional rights are implicated.

In *Camara v. Municipal Court*, *supra*, the Court stressed that less stringent Fourth Amendment standards were applicable to the housing inspection program in question only because "acceptable results" could not otherwise be achieved. 387 U.S. at 537. On the other hand, in *Winston v. Lee*, 470 U.S. 753 (1985), forcible removal of a bullet from the body of a criminal defendant was held to violate the Fourth Amendment in part because there was no compelling need to recover the bullet in light of other available evidence. *Id.* at 765-66.

The requirement that governmental infringement upon protected interests serve a compelling state interest and be narrowly tailored to achieve that end by the least intrusive means available is consonant with the reasoning applied by the Court in other constitutional contexts. *See, e.g., Bates v. Little Rock*, 361 U.S. 516, 524-25 (1960) (requirement that NAACP divulge its membership lists violated freedom of association; no reasonable relationship to a governmental purpose); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (freedom of associa-

tion violated by requirement that teachers report their associational ties "when the end can be more narrowly achieved"); *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963) (denial of unemployment benefits to sabbatarian violated freedom of religion; no compelling interest established); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262-63 (1974) (freedom of travel violated by durational residency requirement for government-subsidized health care; Court must ensure that the state "has chosen means that do not unnecessarily burden constitutionally-protected interests"); *Pacific Gas and Electric Company v. Public Utilities Commission*, —— U.S. ——, 106 S.Ct. 903, 913 (1986) (freedom of speech violated by requirement that public utility insert newsletter of consumer group in its billing envelopes; "no substantially relevant correlation between the governmental interest asserted and the [means chosen]"); *Wygant v. Jackson Board of Education*, —— U.S. ——; 106 S.Ct. 1842, 1852 (1986) (use of racial classifications violated equal protection; "less intrusive means of accomplishing similar purposes . . . are available").

Each of these cases concerned the infringement of a right protected by the Constitution where the government sought to justify its action upon the ground that it desired to promote an important state interest. In each instance, the Court held the government's action unconstitutional because it served no permissible purpose, because the purpose it served was not compelling, or because the compelling interest asserted by the government could be adequately served by less intrusive means.

i. *The Customs Service Testing Program Does Not Serve a Compelling Purpose.*

As emphasized above, no one doubts that the Government has a legitimate and compelling interest in stemming the flow of illicit drugs and discouraging their use among members of its work force. The Government, however, has failed to offer a single example of illicit

drug use by a Customs Service employee. *See* J.A. 10, 12, 15, 53; *National Treasury Employees Union v. Von Raab*, *supra*, 816 F.2d at 173. This leads inescapably to the conclusion that the true purpose of this program is deterrence, not enforcement. *See* J.A. 10, 15, 23, 72, 112-13. Indeed, in announcing the program, Customs Service memoranda speak exclusively in terms of the "threat" of drug abuse, the need to ensure that its work force "remains drug free," and the "deterrent" value of drug screening. J.A. 15, 23.

Any prediction that the testing program will serve the interest in continuing to have a drug free workforce is speculative at best. Just as in *Pacific Gas and Electric Company v. Public Utilities Commission*, *supra*, —— U.S. ——, 106 S.Ct. 903, 913, there is "no substantially relevant correlation between the governmental interest asserted and the State's effort . . ." (quoting *Shelton v. Tucker*, *supra*, 364 U.S. at 485).

If the Government is permitted to require urinalysis with so little justification, then what is to prevent it from eavesdropping on employee telephone conversations at will, forcing employees to empty their purses or pockets on demand, or even conducting regular surveillance of employee restrooms simply on the off chance that such programs might deter future drug use? Surely potential catastrophes can be envisioned which these intrusions could conceivably avoid. But this is not what the Fourth Amendment intends.

> "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber v. California*, *supra*, 384 U.S. at 769-70.

As we will now show, any legitimate benefit gained through the testing program can be, and indeed until now apparently has been, equally well served by means less intrusive than required urinalysis.

ii. *Required Urinalysis Is Not the Least Intrusive Means to Serve the Government's Legitimate Interest in a Drug-Free Work Force.*

The circuit court below implicitly conceded that it approved the Government's urinalysis program not as a means to eradicate an identified problem but as a deterrent, concluding that: "It is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chickens." The circuit court's metaphor is clever, but it misses the point. The relevant inquiry is not whether preventive measures may be taken, but whether there is a limit to the type of "traps" that may be set where human, rather than vulpine, rights and freedoms are at stake.

Applying the circuit court's folksy style, we pose the following alternative formulation of the relevant question here: Is it reasonable to burden employees with a requirement that they wear both suspenders and a belt, where none has ever lost his trousers, and in the absence of evidence that either measure alone is ineffective to achieve the desired end? The answer is obviously no. In the same way, measures less intrusive than, but equally effective as, urinalysis exist for ferreting out employee drug use.

Although there has been a rapid increase in the number of employers using urinalysis to screen employees, a significant number of their colleagues have considered and rejected drug testing. The American Management Association recently conducted a nationwide survey of human resource managers concerning workplace drug abuse. Among the reported findings was the observation that "'[s]mart supervisors' (people who know how to spot possible impairment and intervene), backed by an aggressive program aimed at stopping abuse and providing rehabilitation, are by far the most important agents

in the drive for a drug-free workplace." American Management Association, *Drug Abuse: The Workplace Issues* 9 (1987). For employers who have rejected drug testing, "[o]ther techniques—a firm policy, a clear management stand, and . . . education and training—are considered equal in result and far more cost-effective." *Id.* at 10.

Sensitivity to the rights of employees has led some management and personnel professionals to conclude that workplace substance abuse can be detected more reliably through effective supervision than through drug testing: "Managers are in an ideal position to observe changes in performance and behavior among their workers." Rosen, *Identification of Substance Abusers in the Workplace* 16 Pub. Personnel Mgmt. 204-05 (1987). "Uneven work quality, procrastination, boisterous behavior, excessive friendliness, borrowing money, and accidents on and off the job may signal possible substance-abuse problems." The Conference Board, Report No. 883, *Corporate Strategies for Controlling Substance Abuse* 45 (1986). Other indicators of a drug problem include "unusual mood swings, decreased quality and quantity of work, . . . and deterioration of personal hygiene." Rosen, *Identification of Substance Abusers in the Workplace*, *supra*, at 205.[2] In short, it is not difficult to identify an alcohol or drug abuser . . . ." Muczyak and Heshizer, *Managing in an Era of Substance Abuse*, 31 Personnel Administrator 100 (1986).[3]

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[2] Because substance abuse problems among employees generally manifest themselves through poor performance, insubordination, tardiness, and absenteeism, even management legal counsel occasionally recommend against testing. *See, e.g.*, Hanlon and Voluck, *Workplace Testing: Murky Legal Waters*, 32 Personnel Administrator 56 (1987). "Training supervisors to heighten their awareness of the symptoms of substance abuse . . . may be a much more effective way to curtail the problem than testing." *Id.*

[3] The Government contends it must employ urinalysis in order to detect even those Customs Service employees whose drug use occurs

The federal government itself, through the United States Department of Transportation's National Highway Traffic Safety Administration ("NHTSA"), recently conducted a field evaluation of a drug abuse detection procedure used by the Los Angeles Police Department ("LAPD"). National Technical Information Service, U.S. Department of Transportation, NHTSA Technical Report No. DOT HS 807 012, *Field Evaluation of the Los Angeles Police Department Drug Detection Procedure* (1986). Under the program, persons arrested for suspicion of driving under the influence of drugs are interviewed by officers trained in drug recognition. The trained officer then checks physiological symptoms, without offensive personal intrusion or seizure of bodily fluids, and conducts simple behavioral tests. *Id.* at 5. The NHTSA concluded that officers "trained in the LAPD drug recognition procedure were quite accurate

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outside working hours and away from work. The Government's purported justification is that such drug enforcement employees may fall prey to bribery and blackmail in order to support their drug use. The implicit premise then is that an employee whose drug use is uncontrollable may compromise enforcement efforts. The reality depicted by the available literature, however, demonstrates that an employee whose drug use is uncontrollable, *i.e.*, one who is dependent, will display identifiable symptoms presenting articulable grounds for further inquiry. On the other hand, if the employee is not dependent on drugs, there is no reason to expect that the urinalysis program at issue here will be effective: the employee will merely abstain temporarily in order to evade detection.

We suspect the citizenry the Government seeks to shelter from the availability of illicit drugs would receive greater assurance from a comprehensive program of on-the-job education, training, and supervisory observation of drug enforcement employees than from an ineffective, one-time mechanical test. In fact, the likely explanation for the absence of any evidence that a drug problem exists among the Customs Service work force is that previously employed, non-intrusive personnel screening and observation methods have proved successful. Law enforcement agencies, such as the Customs Service, possess considerable expertise regarding relevant investigatory methods.

when they judged that suspects had used drugs." *Id.* at 24. Remarkably, in half of the suspects they also correctly identified by type all of the drugs later detected in a separately administered drug test. *Id.* "When the officers identify a suspect as having used particular drugs[,] a blood test will almost always confirm their judgment." *Id.*

This admittedly cursory review of selected professional and scientific literature demonstrates that alternatives to drug testing exist. While we do not seek to persuade the Court that any particular alternative is either the most effective or is constitutionally compelled, on this record at least two things are clear. First, the measures employed by the Government *before* it instituted drug testing were apparently 100% successful in preventing drug abuse among its employees. Thus, Customs' "largely drug-free" work force itself demonstrates that effective, less intrusive alternatives to required urinalysis exist and the program is therefore unconstitutional. Second, even assuming the record is wrong and there are a few employee drug abusers of whom Customs was unaware, the failure of both the Government and the circuit court below to consider whether additional measures less intrusive than required urinalysis (without reasonable suspicion of wrongdoing) would weed them out requires that the matter be remanded for further inquiry. Before the Government may resort to the most extreme and intrusive measure—urinalysis in the absence of individualized suspicion—full consideration of less intrusive measures is required.

In its zeal to benefit from the latest in scientific technology, *i.e.*, mass-marketed urinalysis, the Government must also accept the burden of the scientific method. The mere existence of the technology provides neither scientific nor legal justification for its use, and the Constitution does not permit a quantum leap from hypothesis

to unsubstantiated conclusion where Fourth Amendment rights are at stake.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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AMICUS CURIAE BRIEF OF THE NEW JERSEY STATE LODGE, FRATERNAL ORDER OF POLICE

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No. 87-1879

In The

Supreme Court of the United States

October Term, 1987

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,

Petitioners,

v.

WILLIAM VAN RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE NEW JERSEY STATE LODGE, FRATERNAL ORDER OF POLICE

INTEREST OF THE AMICUS CURIAE

Amicus curiae, New Jersey State Lodge, Fraternal Order of Police, is a non-profit corporation of the State of New Jersey chartered in 1949 to support and defend the Constitution of the

United States, to promote and foster the enforcement of law and order, and to improve the skill and efficiency of police officers of the State of New Jersey. Since 1985 the Fraternal Order of Police in New Jersey, representing over 8,000 police officers, has been actively engaged in defending the constitutionally guaranteed privacy rights of public law enforcement employees. *See, e.g. Fraternal Order of Police v. City of Newark*, 216 N.J. Super. 461 (App. Div. 1986). In every case, monitored acquisition and chemical analysis of an employee's urine has been predicated upon government's desire to maintain a drug-free workplace and inspire public confidence that law enforcement agencies are effectively enforcing narcotic and other laws. In the tension between a government's abstract need to promote public confidence by searching bodily fluids and the countervailing individual rights of privacy which are implicated by this type of employer surveillance, we strive to preserve the fundamental rights embodied in the United States Constitution for the members of our organization and all public employees similarly situated.

SUMMARY OF ARGUMENT

All of the courts which have addressed the issue have recognized that urine testings of government employees for drug use is a search and/or seizure subject to the requirements of the Fourth Amendment. *National Treasury Employees Union v. Von Rabb*, 816 F.2d 170 (5th Cir. 1987). Urine testing of government employees for drug use is both a search and seizure for purposes of the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). It has been established that government employees do not relinquish their Fourth Amendment rights ". . . merely because they work for the government . . ." *O'Connor v. Ortega*, 480 U.S. ____, 94 L. Ed. 2d 714, 723 (1987). "[E]ven a limited search of the person is a substantial invasion of privacy." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

Warrantless searches or seizures are presumptively unreasonable unless such search and/or seizure fits within one of the well recognized exceptions to the Warrant Clause of the Fourth Amendment. *O'Connor v. Ortega, supra*, 470 U.S. at ____, 94 L. Ed. 2d at 724-725. Warrantless searches and/or seizures of government employees are not subject to the warrant exception for administrative searches utilized in pervasively regulated industries since such employment does not satisfy the indicia of a pervasively industry-wide regulatory scheme which requires warrantless searches to effectuate the legislative regulatory scheme. *New York v. Burger, supra*, 482 U.S. ____, 96 L. Ed. 2d 601 (1987); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). Government employees retain a "not insubstantial" expectation of privacy which cannot be infringed by the government-employer without some degree of reasonableness both in the inception of the search and/or seizure and in the scope of the search and/or seizure. *O'Connor v. Ortega, supra*, 480 U.S. at ____, 94 L. Ed. 2d at 724-730. To be reasonable at its inception, the government-employer must have a reasonable suspicion that the employees are engaged in wrongdoing and the scope of the search must be united to a search for evidence of the reasonably suspected wrongdoing, *O'Connor v. Ortega, supra*, 480 U.S. at ____, 94 L. Ed. 2d at 728-729.

The court of appeals erroneously concluded that the Customs' drug screening plan will promote the integrity of the Service by sanitizing the workforce of potential drug users and that the government's "mission" to interdict the flow of drugs warranted the substantial invasion of individual rights of privacy implicated in the procedure. In reality, the program cannot achieve its goal; it will not identify drug users nor will it detect those who, by reason of corrupt ethics, present a "moral risk" to the Service. The plan is not designed in response to any identifiable need, but is rather a prophylactic public relations device having no quantifiable significance as a deterrent to drug use. The program

is constitutionally defective as implemented and erodes protected privacy rights by wholesale testing of an applicant pool for key Customs positions, without individualized cause, as a basis to confirm the propriety of management decisions to award promotions or transfers.

The right to employment opportunity is a Fourteenth Amendment liberty interest that is protected against arbitrary governmental interference. The government may not condition access to public benefits, privileges or employment upon the waiver of constitutional rights. Requiring employees to "consent" to urine tests as a condition of career advancement does not render those tests reasonable under the Fourth Amendment. The "consent" to urine tests exacted here is not voluntary within the meaning of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and its progeny, inasmuch as the employee's refusal to submit to the search will result in the forfeiture of an earned "employment opportunity".

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT URINE TESTING OF GOVERNMENT EMPLOYEES FOR DRUG USE WITHOUT A WARRANT, PROBABLE CAUSE OR ANY REASONABLE INDIVIDUALIZED SUSPICION IS NOT PROHIBITED BY THE FOURTH AMENDMENT.

The court of appeals, as well as *every* court that has addressed the issue to date, has correctly recognized that urine testing of government employees for drug use constitutes a search and/or seizure for purposes of the Fourth Amendment. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987). The court of appeals, however, erred in holding that despite the

requirements of the Fourth Amendment as previously articulated by the decisions of this Court, the government can nevertheless require its employees to undergo urine testing for drug use, as a condition of employment, without either the issuance of a warrant or the existence of probable cause or, even minimally, a reasonable suspicion that the employee is engaged or has engaged in illegal drug use.[1] *See Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988).

The Fourth Amendment to the United States Constitution states that:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The framers of the Constitution recognized that personal privacy and dignity are values which are fundamental to a free

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1. *Everett v. Napper*, 833 F.2d 1507, 1509 (11th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266-1267 (7th Cir. 1985), *cert. denied*, 429 U.S. 1029 (1976); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560, 1566 (C.D. Cal. 1987); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 586 (N.D. Ohio 1987); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986); *Allen v. City of Marietta*, 601 F. Supp. 482, 488-489 (N.D. Ga. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984); *Fraternal Order of Police v. City of Newark*, 216 N.J. Super. 461 (N.J. App. Div. 1986); *Smith v. City of East Point*, 183 Ga. App. 659, 359 S.E. 2d 692 (1987).

society and that the Fourth Amendment was designed to protect all citizens against unwarranted intrusions by government into the individual's personal privacy. *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-312 (1978); *United States v. United States District Court*, 407 U.S. 297, 313-318 (1972); *Camara v. Municipal Court*, 387 U.S. 528-529 (1967).

The Fourth Amendment ". . . protects . . . the individual's legitimate expectations that in certain places and at certain times he has the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." *Winston v. Lee*, 470 U.S. 753, 758 (1985) [*citing Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandies, J. dissenting)]; *New Jersey v. T.L.O., supra*, 469 U.S. at 335.

The ". . . evil toward which the Fourth Amendment was primarily directed . . ." was the power of the "sovereign" to conduct general searches or seize the private information or personal effects of the individual without probable cause or even reasonable suspicion. *New Jersey v. T.L.O., supra*, 469 U.S. at 335; *United States v. Ortiz*, 422 U.S. 891, 895 (1975).

Furthermore, it has been firmly established that "individuals do not lose Fourth Amendment rights merely because they work for the government . . ." *O'Connor v. Ortega*, 480 U.S. ____, 94 L. Ed. 2d 714, 723 (1987).

The compulsory urine testing of government employees is both a search[2] and a seizure[3] to which the Fourth Amendment

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2. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Clearly our society expects that the process of urination is a legal (Cont'd)

applies. "[E]ven a limited search of the person is a substantial invasion of privacy." *New Jersey v. T.L.O., supra*, 469 U.S. at 337.

Since compulsory urine testing of governmental employees is both a search and/or seizure within the meaning of the Fourth Amendment, the reasonableness of that search and/or seizure must be assessed in accordance with the standards embodied in the Fourth Amendment.

The analysis must initially proceed from the basic principle embodied in the Fourth Amendment that a search or seizure pursuant to a warrant supported by probable cause is *prima facie* reasonable and that conversely, warrantless searches ". . . are presumptively unreasonable," *United States v. Jacobsen, supra*, 466 U.S. at 114; unless the search and/or seizure falls within a ". . . specifically established and well-delineated exception(s)" to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 356 (1967); *O'Connor v. Ortega*, supra, 470 U.S. at ____, 94 L. Ed. 2d at 724-725.

(Cont'd)
private act which will not be the subject of scrutiny nor subject to examination by others after urination. Just as one does not expect that his or her "brain waves", thought processes or dreams will be examined, so too one has a reasonable expectation that the inner processes of one's body, chemical or otherwise, will normally remain private.

3. A "seizure" can be either of the person or of the person's property or effects. A "seizure" is accomplished ". . . when there is some meaningful interference . . ." with either the ". . . individual's freedom of movement . . ." or with the ". . . individual's possessory interests in [that] property . . ." *United States v. Jacobsen, supra*, 466 U.S. at 113. Compulsory urine testing entails a "meaningful interference . . . with an individual's freedom of movement . . ." in that the procedure requires the individual to urinate in a specified manner at a specified place without individual choice and the urine is thereafter seized by a monitor for subsequent examination of the confidential personal information contained therein. The urine itself is neither contraband nor something reasonably expected to contain contraband.

The ". . . specifically established and well-delineated . . ." exceptions to the warrant requirement have fallen into five basic categories: (1) administrative searches of pervasively regulated industries, *New York v. Burger*, 482 U.S. ____, 96 L. Ed. 2d 601 (1987); (2) searches and seizures conducted under exigent circumstances requiring prompt action which precludes obtaining a warrant and is grounded upon probable cause or at least a reasonable individualized suspicion to support the intrusion, *O'Connor v. Ortega, supra*, 480 U.S. at ____, 94 L. Ed. 2d at 724-730 ("arrantless search of workplace must be based upon reasonable suspicion); *New Jersey v. T.L.O., supra*, 469 U.S. at 734-736 (warrantless school search must be based upon reasonable individualized suspicion); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (reasonable individualized suspicion required for border search and seizure other than for routine border check); *United States v. Place*, 462 U.S. 696 (1983) (reasonable suspicion premised on objective facts that luggage contains contraband or evidence of a crime required in order for limited seizure of traveler's luggage); *Delaware v. Prouse*, 440 U.S. 648 (1979) (discretionary automobile stops require reasonable suspicion); *United States v. Ortiz, supra*, 422 U.S. at 896 (probable cause required to search automobile); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (reasonable suspicion required to stop automobile in border area); *Terry v. Ohio*, 392 U.S. 1 (1968) (reasonable individualized suspicion required for a "stop and frisk"); (3) searches incident to a lawful arrest,[4] *Weeks v. United States*, 232 U.S. 383 (1914); (4) voluntary consent, *United States v. Mendenhall*, 446 U.S. 544 (1980); (5) plain view,[4] *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

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4. The exceptions to the Warrant Clause for searches incident to a lawful arrest and plain view searches are not applicable to the search and seizure herein. The voluntary "consent" exception is discussed at Point III, *infra*.

A. Warrantless Administrative Search Exception

A warrantless administrative search has been held valid only in the context of pervasively regulated industries which require spot inspections in order to enforce compliance with an otherwise valid legislatively adopted regulatory scheme and where the subject of the search is the principal regulatory concern. *Cf. New York v. Burger, supra*, 482 U.S. at ____, 96 L. Ed. 2d at 601; and *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

In all these situations, this Court has required a threshold finding that the specific industry be so highly regulated that the participant has no legitimate expectation of privacy. *New York v. Burger, supra*, 482 U.S. at ____, 96 L. Ed. 2d at 612-613.

In *New York v. Burger, supra*, this Court held that warrantless administrative inspections ". . . even in the context of a pervasively regulated business . . ." must satisfy three essential requirements: (1) ". . . a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made . . ." must in fact exist; (2) the warrantless search ". . . must be 'necessary to further [the] regulatory scheme' "; and (3) the statutorily prescribed inspection process must be ". . . a constitutionally adequate substitute for a warrant" by (a) establishing clear notice ". . . that the search is being made pursuant to law and has a properly defined scope," and (b) statutorily limiting ". . . the discretion of the inspecting officers . . ." as to ". . . time, place, and scope." *New York v. Burger, supra*, 482 U.S. at ____, 96 L. Ed. 2d at 614.

In the case *sub judice*, both the court of appeals and the district court correctly recognized that government employment, *i.e.*, the Customs Service, is *not* a "highly regulated industry" as that term has been defined by this Court. Obviously, the warrantless administrative search exception carved out specifically

for use in "highly regulated industries" and devised solely to satisfy the unique circumstances applicable to a highly regulated industry, cannot be justifiably expanded without completely diluting the underlying rationale upon which the exception was established in the first place. Absent a specific finding that the industry is a pervasively regulated one, the warrantless administrative search exception cannot, and should not, be expanded beyond its intended parameters since, even if government employees might have a lessened expectation of privacy as a result of government employment, such lessened expectation of privacy is not the equivalent of the diminished expectation of privacy assumed by owners or operators of commerical premises or licensed participants in pervasively regulated industries.

Government employment, in and of itself, cannot be classified as a legislatively adopted regulatory scheme for purposes of the administrative search exception to the Fourth Amendment.[5] Furthermore, to justify urine testing of government employees for drug use on the basis of the administrative search exception to the warrant requirement would be contrary to the limited situations of overwhelming necessity for which the exception was created. To expand the exception to the government employees herein would be to resurrect the obnoxious general "writ of assistance" for which the Fourth Amendment was designed to prohibit.

The framers of the Constitution well recognized from their own experiences with the British Crown that individual freedom and personal privacy and dignity in a free and civilized society could not tolerate general searches by the "sovereign", especially in relation to the chilling effect on individuals resulting from such

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5. *See O'Connor v. Ortega, supra*, 480 U.S. at ____, 94 L. Ed. 2d at 728, where this Court recognized that government employees retain a ". . . not insubstantial . . ." right of privacy.

warrantless intrusions by the "sovereign" into ". . . their persons, houses, papers and effects". *United States v. United States District Court, supra*, 407 U.S. at 317-318. The "chilling" effect on individual privacy which resulted from the general searches conducted by the British Crown to deter the use of untaxed tea during the 18th Century is not significantly different than the intended "chilling" effect on the individual privacy and dignity of government employees in the 20th Century which would result from the proposed warrantless search into the bodily fluids of government employees. Without the existence of any reasonable suspicion of wrongdoing, the government employee is compelled to reveal the "personal secrets contained in his or her bodily fluids" or forego otherwise deserved employment and/or employment advancement.

The government concedes that the Customs Service has remained essentially drug-free and that there is not even a general suspicion that drug use or job performance impairment is a serious problem within the Service. Thus, the administrative search exception to the warrant requirement of the Fourth Amendment is inapplicable to government employees generally and to these particular government employees and should not be extended under the factual circumstances presented herein. This is especially so in light of the less intrusive alternatives available to meet any legitimate objectives that the government may have regarding the detection and punishment of illegal activity or wrongdoing by individual government employees.

B. Exigent Circumstance Exception to the Warrant Clause

In certain limited situations this Court has held that under certain *emergent* conditions requiring immediate action the "Warrant Clause" of the Fourth Amendment need not control but instead the Court will resort to the "Reasonableness Clause" of the Fourth Amendment to determine whether the special needs

of the immediate situation rendered the otherwise warrantless search and/or seizure "reasonable" under the totality of circumstances.

In each of these "special" situations the Court has found exigent circumstances which required immediate action and therefore, resort to a warrant "unduly burdensome". In each instance however, the Court nevertheless required the existence of either probable cause or, at minimum, a reasonable suspicion, to justify the "reasonableness" of the otherwise warrantless search and/or seizure. *New Jersey v. T.L.O., supra,* 469 U.S. at 340-342; *United States v. Ortiz, supra,* 422 U.S. at 896-897; *Terry v. Ohio, supra,* 392 U.S. at 20-22, 27.

Once it is determined that the emergent nature of the special situation justifies dispensing with the warrant requirement, the search and/or seizure must be assessed under the "Reasonableness Clause" of the Fourth Amendment. *O'Connor v. Ortega, supra,* 480 U.S. at ____, 94 L. Ed. 2d at 724-729; *New Jersey v. T.L.O., supra,* 469 U.S. at 337-343.

In these special situations the Court has devised a balancing test which ". . . requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion'. " *O'Connor v. Ortega, supra,* 480 U.S. at ____, 94 L. Ed. 2d at 724 [*quoting United States v. Place,* 462 U.S. 696 (1983)]. In order to determine the reasonableness of the search and/or seizure the Court must balance the individual's legitimate expectation of privacy against the governmental necessity for the warrantless intrusion in light of the less intrusive alternatives available to accomplish that particular governmental interest.

Under the "reasonableness standard" embodied in the Fourth

Amendment ". . . both the inception and the scope of the intrusion must be reasonable." *O'Connor v. Ortega, supra,* 480 U.S. at ____, 94 L. Ed. 2d at 728; *New Jersey v. T.L.O., supra,* 469 U.S. at 341.

As this Court held in *New Jersey v. T.L.O., supra:*

> Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider "whether the . . . action was justified at its inception," *Terry v. Ohio,* 392 U.S., at 20 [20 L. Ed. 2d 889, 88 S. Ct. 1868, 44 Ohio Ops. 2d 383]; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the inference in the first place," *ibid.*
>
> *New Jersey v. T.L.O., supra,* 469 U.S. at 341.

In those situations where either the individual's privacy interest is substantial or the need for a quick response to an emergent situation is somewhat attenuated, the Court has not hesitated to require that probable cause exist before the warrantless search and/or seizure can be deemed reasonable under the Fourth Amendment. *United States v. Ortiz, supra,* 422 U.S. at 896-897.

In those special situations where the individual's legitimate expectation of privacy is diminished and the "special needs" of the government are significantly important ". . . beyond the normal need for law enforcement mak[ing] the . . . probable cause requirement impracticable," the Court has held that a warrantless search and/or seizure may sometimes be supported only by a reasonable suspicion that the individual is engaged in illegal activity or misconduct. *O'Connor v. Ortega, supra,* 480 U.S. at ____, 94 L. Ed. 2d at 728-729; *New Jersey v. T.L.O., supra,* 469 U.S. at 341-342.

Even where the intrusion can be supported by a reasonable suspicion of misconduct, rather than a requirement of probable cause, the search and/or seizure must still be both reasonable at its inception and reasonable in its scope.[6] *O'Connor v. Ortega, supra,* 480 U.S. at ____, 94 L. Ed. 2d at 728-729; *New Jersey v. T.L.O., supra,* 469 U.S. at 341-342.

It has been uniformly recognized by the courts that urine testing of government employees for drug use constitutes more than a "minimal intrusion" into the individual's legitimate "expectation of privacy." *Railway Labor Executives Association v. Burnley, supra,* 839 F. 2d at 575; *McDonell v. Hunter, supra,* 809 F.2d at 1302; *Feliciano v. City of Cleveland, supra,* 661 F. Supp. 578; *Capua v. City of Plainfield, supra,* 643 F. Supp. at 1513-1514.

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6. A "seizure" of the person is normally only justified at its inception where there is at least a reasonable suspicion of wrongdoing and the length of the seizure must be reasonably related to the initial justification for the seizure, *United States v. Brignoni-Ponce, supra,* 422 U.S. at 881-883. A "seizure" of personal effects would likewise require either probable cause or reasonable suspicion that the ". . . property contains contraband or evidence of a crime" even where the seizure is ". . . minimally intrusive of Fourth Amendment interests." *United States v. Place, supra,* 462 U.S. at 706. With respect to the scope of the seizure, ". . . the brevity of the invasion of the individual's Fourth Amendment interest is an important factor in determing whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." *United States v. Place, supra,* 462 U.S. at 709-710.

With respect to a "search", ordinarily there is a requirement of probable cause. *United States v. Ortiz, supra,* 422 U.S. at 896. However, even in the extraordinary situations which permit a limited "search" on less than probable cause, there is the minimum requirement that its inception be based upon ". . . reasonable grounds for suspecting that the search will turn up evidence . . ." of wrongdoing and that the scope of such search must be ". . . reasonably related to the objectives of the search and not excessively intrusive . . ." in view of the reasonably articulable facts from which the individual's misconduct was reasonably suspected in the first place. *New Jersey v. T.L.O., supra,* at 341-342; *O'Connor v. Ortega, supra,* 480 U.S. at ____, 94 L. Ed. 2d at 728-729.

Compulsory urine testing is not only degrading to the individual but highly intrusive into the individual's reasonable expectation of privacy in the personal information contained in one's bodily fluids. *Capua v. City of Plainfield, supra,* 643 F. Supp. at 1513-1514; *McDonell v. Hunter,* 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd. as modified,* 809 F. 2d 1302 (8th Cir. 1987). Almost every court that has considered the issue has come to the same conclusion. In order to determine whether urine testing of government employees for drug use is "reasonable", the testing must satisfy both prongs of the reasonableness standard, *i.e.,* whether such a search or seizure is reasonable at its inception, and if reasonable at its inception, whether it remains reasonable in its scope. *O'Connor v. Ortega, supra,* 480 U.S. at ____, 94 L. Ed. 2d at 728-729; *New Jersey v. T.L.O., supra,* 469 U.S. at 341-342.

Any determination that a warrantless search is justified at its inception has generally required ". . . reasonable grounds for suspecting that the search will turn up evidence . . ." of wrongdoing. *O'Connor v. Ortega, supra,* 480 U.S. at ____, 94 L. Ed. 2d at 729; *New Jersey v. T.L.O., supra,* 469 U.S. at 342. Again, almost every court that has responded to the issue[7] has held that urine testing of government employees for drug use is only justified at its inception where there exists a "reasonable individualized suspicion" that the individual is engaged in illegal drug use. *Railway Labor Executives Association v. Burnley, supra,* 839 F.2d at 575; *McDonell v. Hunter, supra,* 809 F.2d at 1302 (except for those prison guards actually within the confines of medium and maximum security prisons, all other prison guards can only be compelled to undergo urine testing based upon reasonable individualized suspicion of drug use).

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7. Other than in the context of the administrative search exception utilized in "pervasively regulated industries" as previously discussed.

In almost every context, this Court has recognized that, except for the most minimal intrusions, any warrantless intrusion into the individual's legitimate expectation of privacy, is unconstitutional without some reasonably articulable degree of individual suspicion of wrongdoing. *New Jersey v. T.L.O., supra,* 469 U.S. at 342 n. 8; *United States v. Martinez-Fuerte,* 428 U.S. 543, 560-561 (1976). *See also, Railway Labor Executives Association v. Burnley, supra,* 839 F.2d at 575; *McMorris v. Alioto,* 567 F.2d 897 (9th Cir. 1978).

The reasonableness standard further requires that the search be reasonably related in scope to the factual circumstances which justified the search and/or seizure in the first place. *New Jersey v. T.L.O., supra,* 469 U.S. at 341. Thus, even if a reasonable individualized suspicion might not be necessary at the inception of the search and/or seizure,[8] nevertheless, the testing must still be performed in the least intrusive manner, and the scope of the search and/or seizure must be defined by the object of the search, *New Jersey v. T.L.O., supra,* 469 U.S. at 342; *McDonell v. Hunter, supra,* 809 F.2d at 1302. If the object of the search is to determine impairment to perform work-related activities, then the drug testing program upheld by the court of appeals herein becomes meaningless since the manner in which the tests are conducted cannot measure current drug use or even present, or future, impairment. On the other hand, if the testing program is intended to reveal corruption on the part of government employees then the testing cannot be justified at its inception without a warrant based upon probable cause, or in emergent circumstances which except the search from the warrant requirement, probable cause or, at minimum, a reasonable suspicion of wrongdoing justify

8. *Shoemaker v. Handel,* 795 F.2d 1136 (3rd Cir. 1986), *cert. denied,* 107 S. Ct. 577 (1986) (licensed jockeys subject to pervasive regulatory scheme); *McDonell v. Hunter, supra,* 809 F.2d at 1301 (prison guards while on duty within the confines of maximum security prisons).

testing of the suspected employee(s). *See O'Connor v. Ortega, supra,* 480 U.S. at ____, 94 L. Ed. 2d at 728-729; *New Jersey v. T.L.O., supra,* 469 U.S. at 341-342.

Therefore, the drug testing required herein does not satisfy the "reasonable test" since it does not require a sufficient individualized suspicion at the inception of the search and/or seizure. In view of the requirements of the Fourth Amendment and the law applicable thereto, compulsory urine testing of government employees should not be permitted absent probable cause or, at minimum, a reasonable individualized suspicion of wrongdoing or impropriety by the employee.

II.

CUSTOMS' DRUG SCREENING PROGRAM IS NOT REASONABLY CALCULATED TO DETECT DRUG USERS, WILL NOT ACHIEVE ITS PURPORTED OBJECTIVE NOR SERVE AS A MEANINGFUL DETERRENT, AND IS NOT OTHERWISE A SUFFICIENTLY PRODUCTIVE EMPLOYEE SURVEILLANCE DEVICE TO PASS CONSTITUTIONAL MUSTER.

Under the first phase of Customs' plan to require all Customs Service members to submit urine specimens for drug screening, Commissioner Von Raab issued a Directive on June 16, 1986 specifically related to the testing of employees about to be moved to "sensitive" positions (JA23-36). Thereunder all current employees tentatively selected for transfer or promotion to key positions must submit urine specimens for drug analysis regardless of their prior employment record or the longevity of meritorious service. Based upon any objective reading of the record below, the program cannot achieve its desired objective. As applied, the testing at issue cannot detect a drug user with certainty. Nor can the program differentiate "false negative" urinalysis reports from

"true negative" findings or ensure that employment judgments based on such information are sound. Thus, this Court must weigh the "not insubstantial" invasion of individual privacy against the need of the government to implement a program of *questionable efficacy*. That balance can only be weighed in favor of the individual's right of privacy. *New Jersey v. T.L.O., supra*, 469 U.S. at 341.

The empirical evidence before this Court demonstrates that candidates for key positions in the United States Customs Service do not use drugs. Commissioner Von Raab has conceded that there is no perceived threat of drug use or jeopardy to the integrity of Customs arising therefrom since Customs is admittedly "largely drug-free" and its workforce has historically demonstrated "noteworthy integrity." No instances of prior employee misconduct have been attributed to drug use. Based on this record, logic dictates that Customs should continue to be a drug-free government agency without resort to surveillance of the type in question. In assessing Customs' "need" to conduct drug screening, the government can point to no identifiable problem requiring response. The program is prophylactic in nature arising from the fear that individuals within the "covered position" applicant pool, as members of society at large, may possess ethics which have been contaminated by prior drug use. This argument lacks substance when applied to veteran employees who, based upon prior job performance, have been predetermined to be suitable for advancement within the Service.

As the court of appeals eventually clarified, the real goal of the Customs' directive is to identify prospective key employees who present a "moral risk". Thus urine is seized and searched as a qualitative test of character. The court below briefly discussed the availability of lesser intrusive methods of conventional surveillance or investigation, yet without explanation and without factual evidence, the court concluded that traditional devices which

have led to a largely drug-free Customs Service were "inadquate". The court further failed to focus meaningfully on whether or not urine testing is, or even can be, an appropriate or "sufficiently productive mechanism" to detect propensity for corruptability. The court also failed to recognize that the targets of the search, as current employees of Customs, have undergone employer scrutiny when appointed to the position from which they now seek promotion or transfer, or during the course of their employment, and have presumably exemplified acceptable performance culminating in their successful consideration for advancement as "tentatively approved" personnel. Where, as here, urine testing is used as a vehicle to provide mere confirmation of the "rightness" of prior and present management decisions, the government's zeal goes too far.

The government justifies the search *sub judice* on the theory that Customs has a special responsibility to promote public confidence in its operational activities as a law enforcement agency. Given the expressed rationale for the program, this Court should not endeavor to analogize Customs to the private sector. The record does not support that drug usage has threatened the performance of Customs employees or the safety of the workplace. Rather, urinalysis is advocated as a means to effectuate a unique governmental "mission". In the most basic terms, Customs has attempted to police its workforce as a public relations device solely to enhance confidence in the government.

If the abstract interest in fostering public sentiment that government is doing its job can serve as justification for urine testing, predictably this "need" will be likewise espoused to support the testing of all employees of the executive, legislative and judicial branches of the federal government. The day of "Clinical McCarthyism", a euphorism for government surveillance of urine, will have come of age.

Although the act of voiding might not be viewed directly by an official monitor, there is nevertheless substantial degradation experienced by a worker in having to prove desirable character traits by the purity of his/her excrement. The search and seizure of bodily fluids as evidence of employment worthiness is extremely offensive. The court of appeals erroneously focused merely on the event of voiding and completely disregarded the adverse impact upon employee morale and job functioning which flow from the humiliating experience of having been subjected to a search and seizure most criminal suspects do not normally encounter.

The court of appeals further ignored the fact that Customs cannot guarantee that no adverse inference will be drawn from a refusal to submit to urinalysis. "Policy" promises are illusory since inferences, by definition, arise from mental processes beyond official policy control. Assurances aside, there is no practical means to ensure against the possibility that suspicion will be cast upon an employee who has declined to submit to urine testing. The rejection of professional advancement and concomitant financial benefits is arguably a staggering event. In the course of human experience, it is unusual for an employee to reject career opportunities and compensation at a higher pay grade. Clearly those individuals who desire to exercise Fourth Amendment rights are compelled to weigh that decision against countervailing concerns as to its effect upon the current offer of advancement, family income, the ability to ascend the career ladder and postponement of the opportunity for future and other promotions, and the possibility that a refusal to provide a sample may be regarded as an attempt to hide evidence of drug use.

Further, while the court of appeals determined that the program was "non-discretionary," it is clear that only those individuals who have been tentatively selected for promotion or transfer by traditional evaluation methods, subjective in nature, constitute the class of subjects to be tested. The court's analysis

was short-sighted in ignoring that it is possible for Customs to gain the opportunity to conduct urine screening of any person by inviting him/her to apply for a covered job slot and granting him/her preliminary approval status.

The court below also erred in rejecting the presumptive protection of the Warrant Clause that all searches be predicated upon probable cause or some minimum standard of suspicion. In so doing, the court failed to recognize that Customs intends to conduct investigatory searches and seizures for unlawful drug use in circumstances in which no grant of immunity from prosecution has been offered. Possible exposure to criminal proceedings has been an important factor considered by all courts which have dealt with the constitutionality of urine testing. The absence of procedural guarantees providing that information derived from the testing program will be held strictly confidential and not utilized by prosecutorial authorities militates in favor of the application of the Warrant Clause. It is simply inconceivable that urine testing, if deemed permissible under the Fourth Amendment, will somehow lose its constitutional character if the search and seizure were challenged, or even challengeable, in the course of criminal proceedings. Even without regard to criminal prosecution, the penal ramifications flowing from a positive sample, *i.e.*, discharge from employment, may be more severe than the applicable criminal penalty. In the case of a positive sample, urinalysis will be used to justify discharge at a pre-termination hearing, leaving to the employee the burden of explaining the presence of drugs in his system in violation of the Fifth Amendment guarantee against compulsory self-incrimination. Alternatively, the employee can opt to exercise Fifth Amendment rights at, of course, the expense of his job. Since there is no guarantee that information regarding a sample will not be accessed by other federal agencies or will be protected from disclosure should the government's subpoena power be exercised, the consequences of the test are substantial and minimally require

that reasonable individualized suspicion support required urinalysis. Further Fifth Amendment issues surround the program's requirement that an employee "voluntarily" record certain information related to drug intake or drug contact within the previous thirty days upon a "Pre-Test Form" (JA34).

We disagree with the court of appeals that the test of Fourth Amendment reasonableness is decided primarily with respect to the efficacy and manner of implementing the particular program. A directive requiring the submission of a urine specimen for analysis as a precondition to promotion or transfer must be constitutionally reasonable on its face. In the employment context, a search may be reasonable if grounds exist for expecting the search to generate evidence of "work-related misconduct". *O'Connor v. Ortega, supra*, 480 U.S. at ____, 94 L. Ed. 2d at 728-729. Customs did not attempt to justify the program on this basis.

As set forth in Point I, *supra*, Customs' acquisition and testing of urine without a warrant, probable cause or a minimal standard of individualized suspicion precludes a finding of facial constitutionality. As applied, the program is equally defective. Based upon the undisputed expert evidence, the program will not effectively identify drug users. Secondly, there is no medical or scientific evidence to link prior drug use to future predisposition toward engaging in employee misconduct. The record, in fact, substantiates that prior misconduct was not related to drug-use. Thus, corrupt personnel who do not use drugs will be affirmatively identified (through negative urinalysis) as key employees who do not present a risk to the integrity of the Service.

In terms of promoting public trust, there is no evidence in this case to suggest that the public is or will be more enthused about a program implemented on a wholesale scale rather than testing which is undertaken for cause. Given the size of the federal deficit and outcries to control government spending, the public

might well prefer to limit expenditures associated with drug testing to those occasions in which it is reasonably indicated to be necessary. There is no reason to believe that the public lacks confidence in Customs' capability to identify those who use or possess drugs as this is the very nature of the work routinely performed by the searching party.

Since a period of programmed abstinence, or adulteration, or dilution of the sample can engender a negative finding, the unreliability of the program renders it constitutionally defective. Notice that drug testing is indispensably attenuated to placement in a covered position is communicated at least twice by Customs: once in written recruitment materials and again in the body of a Notice of Tentative Selection which apprises the employee of presumptive eligibility for final placement subject only to completion of certain events. Submission to urine testing is a standard requirement (JA26-27, 33, 75). The time span between receipt of the Notice of Tentative Selection and a scheduled urine test coincides with complete metabolism of the substances for which urine is screened. Petitioners' experts also concur that manipulation of the concentration of urine can be easily accomplished by excessive fluid intake prior to the scheduled test date. Thus depending upon the sensitivity calibration of testing equipment (the cut-off level expressed as nanograms per milliliter), positive tests can be erroneously reported to be negative. Test errors may further arise from such factors as post-acquisition tampering, storage and transportation. For example, Customs does not use a state of the art specimen bottle containing a self-sealing cap which deposits a liner upon the interior rim of the bottle to guard against malicious "spiking." Moreover when the sample is mailed by the collection agent from locations thoughout the United States to a laboratory in California, it is exposed to a wide variety of temperature conditions prevailing at transmittal and delivery locations and in various cargo areas during the shipment process. No aliquot sample is provided to employees

at the time of the test. Rather the employee is entitled to receive only a portion of the unconsumed sample for retesting purposes.

Because of rapid drug dissipation in the system, potential drug abstinence and/or the possibility for adulteration of the specimen, the testing program at issue will not render meaningful findings. Indeed, Customs is aware of the relatively brief "window" of time that drug use will be revealed. By establishing thirty days in the Drug Screening Pre-Test Form as the outer limit time period for reporting contact with drugs, Customs recognizes that the testing program is only capable of identifying drug intake of very recent vintage. Although "body to bottle" direct observation and the administration of "surprise" tests without notice would render the results more accurate from a medical perspective, the cost of scientific reliability would serve only to further erode Fourth Amendment and due process rights.

Furthermore, the concept of deterrence cannot serve as a rational basis for this program. There is no scientific evidence before the Court that drug testing programs can deter or prevent use of illegal drugs of abuse. Under the Commissioner's directive, a subject will not be retested as long as the individual retains the new position. Only those persons who demonstrate exemplary service warranting further advancement within Customs will be tested more than once. If the program operates to thwart applications for key positions by drug users, such deterrence is of short-term duration since one need only abate drug intake upon news of the next vacancy to circumvent the program at a later date.

With regard to testing for employee "fitness", the government argues that ingestion of drugs will impair performance and pose a potential threat to safety. Assuming that these risks emanate from a drug's impact upon the central nervous system, one assumes that drug usage is manifested physiologically to trained observers. Thus, testing conditioned upon probable cause or reasonable

individualized suspicion does not present a burden. If Customs is not capable of detecting impairment in job performance due to drug use, the subject program does not place Customs in any better position since the program does not contemplate spot-checking employees in the course of their functions. At best, the drug testing program would foreclose promotion or transfer to a person proven to have evidence of drug use in his/her urine in the unlikely circumstances that an individual, knowing that he or she has consumed controlled substances, nevertheless submits to testing and risks the consequence of discharge. It is equally suspect that an employee seeking assignment to a job accessing him/her to confidential information for a corrupt purpose (or "foxes" as characterized by the court below), would jeopardize the progress of such a pernicious plot by engaging in drug use during the testing timeframe.

Thus the Commissioner's directive cannot fulfill any purpose for which the program was designed. Accordingly, individual rights must prevail on balance and the program determined to be unconstitutional under the Fourth Amendment.

III.

THE CUSTOMS SERVICE MAY NOT REQUIRE ITS EMPLOYEES TO CONSENT TO A WAIVER OF CONSTITUTIONAL RIGHTS AS A CONDITION OF EMPLOYMENT IN COVERED POSITIONS.

It is firmly established that the government, as employer, cannot impose upon its employees conditions of employment which are unconstitutional.[9] "The right to *employment opportunity*,

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9. *See, e.g., Lefkowitz v. Cunningham*, 431 U.S. 801, 804-6 (1977) (statute conditioning office in a political party on waiver of Fifth Amendment (Cont'd)

although not a fundamental right, remains a Fourteenth Amendment liberty interest that is protected against arbitrary governmental interference." *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (emphasis supplied). Although the court of appeals acknowledged that the urine tests at issue were "searches" within the meaning of the Fourth Amendment, the Court nevertheless expressed the view that the Customs Drug Screening Program is "to some extent, consensual," inasmuch as employees who decline to be tested will not lose their jobs, but rather will only be denied the opportunity for career advancement. Reliance on the "consent" theory to validate the Customs Drug Screening Program, however, is erroneous and contrary to established law.

If, as is contended in Point I, *supra*, the searches conducted by the Customs Drug Screening Program are unlawful then the government may not condition "employment opportunity", a well recognized liberty interest protected from arbitrary governmental action, upon an employee's waiver of his constitutional rights to be free of such unreasonable searches. In a long line of cases, the Supreme Court has consistently adhered to the principle that the government may not condition access to public benefits or privileges on the waiver of a constitutional right. In *Frost v. Railroad Commission*, 271 U.S. 583, 593-594 (1926), the Supreme Court stated:

(Cont'd)
declared unconstitutional); *Lefkowitz v. Truley*, 414 U.S. 70, 82 (1973) (statute requiring architects to waive Fifth Amendment privilege or be disqualified from eligibility for public contracts held unconstitutional); *Perry v. Sindermann*, 408 U.S. 598 (1968) (state may not condition public employment on waiver of First Amendment free speech rights); *Herbert v. Verner*, 374 U.S. 398 (1968) (unemployment benefits may not be conditioned on relinquishment of rights under the free exercise of religion clause of the First Amendment); *Garrity v. New Jersey, supra*, 385 U.S. at 493 (1967) (continued public employment may not be conditioned on waiver of Fifth Amendment rights).

> It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege all together, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that the guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Since *Frost*, the Supreme Court and the lower courts have consistently applied this principle and held that "public employment cannot be conditioned upon waiver of constitutional rights." *See, e.g., Hampton v. Mow Sun Wong, supra*, 426 U.S. at 88; *Pickering v. Board of Education, supra*, 391 U.S. at 568 (1968); *Garrity v. New Jersey, supra*, 385 U.S. at 493 (1967); *Railway Labor Executives Association v. Burnley, supra*, 839 F.2d at 589; *National Federation of Federal Employees v. Weinberger, supra*, 818 F.2d at 943; *McDonell v. Hunter, supra*, 809 F.2d at 302; *Feliciano v. City of Cleveland, supra*, 661 F.Supp. at 586.

Assuming *arguendo*, however, that the Customs Service employees could be constitutionally required to consent to urine tests should they desire a promotion to a covered position, that practice is nevertheless constitutionally flawed since the government has failed to meet its burden of demonstrating that the employee knowingly and voluntarily waived his/her constitutional rights in that setting. In *Schneckloth v. Bustamonte*, 412 U.S. at 218, the Supreme Court stated:

> Where the subject of a search is not in custody and the State attempts to justify the search on the basis of consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied
> . . . .

The burden is upon the government to demonstrate that there has been a voluntary relinquishment of the constitutional right at issue. There is a presumption that arises against such a waiver of constitutional rights. *Schneckloth v. Bustamonte, supra,* 412 U.S at 222; *Tartar v. Raybuck,* 742 F.2d 977, 986 (6th Cir. 1984) *cert. denied,* 470 U.S. 1051 (1985).

An individual cannot be penalized for refusal to consent to an otherwise invalid search. *Camara v. Municipal Court, supra,* 387 U.S. at 540.

Although the government has the authority to impose reasonable conditions of employment, those conditions must be consistent with the law. As set forth, *supra,* the searches here represent an unreasonable search and seizure in violation of the Fourth Amendment. Further, the government has failed to meet its burden of demonstrating anything approaching a "knowing" and/or "voluntary" waiver of constitutional rights. In the context where the employee's refusal to submit to the search will result in the forfeiture of an earned "employment opportunity" (disqualification from a government job and the loss of career advancement), "consent" can never appropriately be utilized to validate an otherwise unreasonable search and seizure.

CONCLUSION

For the reasons expressed, we urge that the decision of the court of appeals be reversed.

Respectfully submitted,

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BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION, and
ARGENT ACOSTA, President, Chapter 168,
National Treasury Employees Union,
Petitioners,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF LOUISIANA IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1879

NATIONAL TREASURY EMPLOYEES UNION, and ARGENT ACOSTA, President, Chapter 168, National Treasury Employees Union,
Petitioners,

v.

WILLIAM VON RAAB, Commissioner, United States Customs Service,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF LOUISIANA IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit organization with over 250,000 members, dedicated to the protection and defense of the civil rights and civil liberties of all Americans. The ACLU has long been active in the defense of Fourth Amendment rights, having appeared before this Court as counsel or *amicus* in such recent Fourth Amendment cases as *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The ACLU of Louisiana filed an *amicus* brief in the court of appeals below.

This case presents important Fourth Amendment issues arising from an unprecedented effort by the federal government to seize at random the bodily fluids of hundreds of thousands of its employees and search those fluids by urinalysis for evidence of illegal drug use. The ACLU and its local affiliates around the United States have been and are counsel or *amicus* in numerous cases challenging urinalysis drug testing programs, frequently on behalf of government employees. Accordingly, we believe that our involvement in and familiarity with the urinalysis drug testing field and the approaches taken by the lower courts will assist the Court in considering the entire range of issues implicated by this case.

SUMMARY OF ARGUMENT

The mandatory drug testing program instituted by the Customs Service is an affront to the values embodied in the Fourth Amendment. The Customs Service program not only dispenses with the traditional Fourth Amendment requirements of a warrant and probable cause; it discards any notion whatsoever of individualized suspicion. Wholly random searches and seizures of this sort are fundamentally at cdds with the concept of particularity on which Fourth Amendment reasonableness rests.

This Court should not countenance such a drastic departure from constitutional norms. Although random drug testing is a new concept, the applicable Fourth Amendment principles are well established. The court below abandoned those principles and instead engaged in an unfocused "balancing" of governmental needs against individual privacy. This case affords the Court an opportunity to reaffirm that the traditional requirements of a warrant and probable cause constitute the Fourth Amendment norm, not to be forsaken unless (a) the search or seizure is of limited intrusiveness and (b) application of those requirements would be unworkable. Neither of these circumstances is present with urinalysis drug testing. In addition, the Court should make clear that, even where a

balancing is in order, a careful examination is required of both the types of government "need" alleged and their nexus to the search and seizure proposed.

The government essentially claims that its special status as an employer entitles its drug testing scheme to be reviewed under watered-down Fourth Amendment standards. But this Court has never given the government *carte blanche* to ignore normal Fourth Amendment strictures merely because it is also an employer. Where the government claims constitutional dispensation in order to carry out its particular responsibilities as an employer, the scope of the interests upon which it can rely must be circumscribed by the special status that it asserts. In particular, the government cannot forego compliance with Fourth Amendment requirements while aiming to provide an example for society at large or to supplement enforcement of the drug laws. Furthermore, even legitimate employment-related interests do not excuse an overly intrusive form of search and seizure—one broader than necessary to carry out the employer's limited objectives. Where, as here, the government admits that it has no evidence of any drug problem, it cannot justify its extraordinary departure from the Fourth Amendment's traditional requirements.

ARGUMENT

The Customs Service program now before this Court is but one of countless urinalysis drug testing schemes threatening to sweep the nation. Public employers already have implemented or have sought to implement drug testing programs in a wide range of circumstances, and far more extensive plans are impending.

The present Administration has taken the lead in pressing for mandatory random drug testing of federal government employees under President Reagan's Executive Order 12,564.[1] On May 3, 1988, the Administration satisfied all remaining procedural prerequisites to its im-

[1] 51 Fed. Reg. 32,889 (1986).

plementation of a massive random urinalysis drug testing problem applicable to hundreds of thousands of federal employees.[2] This program will cover many categories of employees never before subject to random testing, including, for example, attorneys and legal support personnel in the Department of Justice, and doctors and medical researchers at the National Institutes of Health.[3]

Much of the federal government's interest in drug testing appears to have little to do with its role as an employer. Rather, in its role as sovereign, the government perceives drug testing as another weapon in its battle against drug use. President Reagan and top officials of the Department of Justice have repeatedly made clear that a principal goal of the federal government's drug testing efforts is to spur creation of similar programs by other employers, including those in the private sector not directly constrained by the Fourth Amendment. Insofar as the federal workplace is concerned, the President himself recognizes that "an overwhelming majority of Federal employees have never had trouble with illegal drugs."[4] Here, the Customs Service has made no effort to justify its testing program on the basis of even a suspicion of illegal drug use. To the contrary, the Commissioner has described the service as "largely drug free," *National Treasury Employees Union v. von Raab*, 816 F.2d 170, 173 (5th Cir. 1987), and has admitted that he is "unaware of any specific drug 'problem' in either the internal or external applicant pool for sensitive Customs positions."[5] Indeed, in the first five months of testing, there were *no* positive results in the Customs Service. *Id.*

In August 1986, shortly before the Executive Order on drug testing was promulgated, President Reagan emphasized that the aims of his program went beyond federal employees:

> Our first goal is to seek a drug-free workplace for all Americans. . . . To accomplish this we propose to create a drug-free workplace for all Federal employees; to encourage State and local government to follow the Federal Government's example; to solicit commitments from government contractors to establish drug-free work environs; to mobilize management and labor leaders in the private sector to fight this problem.[6]

Similarly, former Assistant Attorney General Richard K. Willard, then head of the Justice Department's Civil Division and responsible for defending the federal government's drug testing programs, told Congress in September 1986:

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[2] On that date, 42 federal agencies submitted plans to Congress providing for random testing of an estimated 345,528 federal employees. Wash. Post, May 4, 1988, at A1. In several agencies, testing was authorized prior to May 3, 1988. Constitutional challenges to those programs have yielded differing results. *Compare National Fed'n of Fed. Employees v. Carlucci*, Civ. Action No. 86-0681 (D.D.C. Mar. 1, 1988), *appeal docketed*, No. 88-5080 (D.C. Cir. Mar. 16, 1988) (random drug testing of civilian employees of Department of the Army in "critical" positions violates Fourth Amendment) *with American Fed'n of Gov't Employees v. Dole*, 670 F. Supp. 445 (D.D.C.), *appeal docketed*, No. 87-5417 (D.C. Cir. Dec. 11, 1987) (random drug testing of Transportation Department employees in "sensitive" positions constitutional).

[3] Executive Order 12,564 authorizes the testing of all federal employees in so-called "sensitive" positions. "Sensitive" positions are broadly defined to include: (1) positions considered sensitive under existing federal personnel criteria; (2) positions potentially involving access to classified information; (3) Presidential appointees; (4) law enforcement officers; and (5) any other positions involving law enforcement, national security, the protection of life and property, public health or safety, or any other functions "requiring a high degree of trust and confidence." E.O. 12,564 § 7(d), 51 Fed. Reg. 32,892-93.

[4] 22 Weekly Comp. Pres. Doc. 1333 (Oct. 6, 1986).

[5] Declaration of William von Raab ¶ 10 (Joint Appendix ("J.A.") 112).

[6] 22 Weekly Comp. Pres. Doc. 1041 (Aug. 4, 1986). *See also* 24 Weekly Comp. Pres. Doc. 185, 186 (Feb. 8, 1988); 22 Weekly Comp. Pres. Doc. 1331 (Oct. 6, 1986).

> The Administration's program, as set forth in Executive Order 12564, is designed to achieve not only a drug-free federal workplace, but also to serve as a model for similar programs in the private sector. We also hope that the federal initiative will provide an incentive for state and local government to initiate their own programs that will serve the unique needs of their local communities.[7]

While the government proposes by means of its drug testing programs to set an example to other employers of how to achieve a drug-free workplace, it is more likely to set quite another example instead—one of contempt for the privacy and dignity of employees. As we show below, drug testing enables the employer to peer into the conduct of its employees outside of the workplace, just as surely as if government agents prowled through employees' homes and effects. Drug testing programs such as the one at issue here thus threaten the traditional concept of privacy embodied in our social fabric, for as Justice Brandeis reminded us in his dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928), *overruled*, *Katz v. United States*, 389 U.S. 347 (1967): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."

Federal officials have also indicated that the Administration wants drug testing programs commenced in both the public and the private sectors in an attempt to supplement conventional law enforcement efforts. The President's Executive Order on drug testing had its genesis in the Report of the President's Commission on Organized Crime issued in March 1986, which detailed the inadequacy of interdicting drug imports, and recommended a greater governmental effort to control drug demand, including "suitable drug testing programs" by

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[7] Statement of Richard K. Willard, Assistant Attorney General, before the Subcommittee on Human Resources of the House Committee on the Post Office and Civil Service at 1 (Sept. 25, 1986).

all federal agencies.[8] Thus, drug testing, as Attorney General Edwin Meese III puts it, is part of the Administration's "user accountability strategy."[9] Other top Justice Department officials have frankly admitted that drug testing is a crucial element in a new demand-side attack on illegal drug use.[10]

While enforcement of the drug laws is clearly a responsibility of the government as sovereign, it is a responsibility that should not be permitted to overwhelm the government's role as employer and to distort its constitutional relationship to its employees. As Justice Brandeis cautioned in *Olmstead*:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding.

277 U.S. at 479.

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[8] President's Commission on Organized Crime, Report to the President and Attorney General, *America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime* (March 1986) at 483. Executive Order 12,564 justifies random employee drug testing in part because "[t]he profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society." *See* 51 Fed. Reg. 32,889 (1986).

[9] The Sun (Baltimore), Apr. 27, 1988, at A1.

[10] "Eradication, interdiction, and enforcement alone can never solve the problem as long as narcotics trafficking remains a lucrative enterprise. It is lucrative because the American demand for illegal drugs makes it so. Therefore, out of necessity, we have chosen to employ strategies which address both the supply-side and the demand-side of the drug equation with equal fervor. And a key aspect of the drug demand reduction strategy is the judicious use of drug testing by employers." Address of Hon. Arnold I. Burns, Deputy Attorney General, before the Annual Convention of the Federal Bar Association at 3 (Sept. 18, 1987).

A war on drugs is a good idea—but not if its first casualty is the Bill of Rights. Random drug testing is a radical departure from our constitutional tradition, for it treats every citizen indiscriminately as a suspect. The Framers had experienced that notion under the Crown, and thinking it antithetical to a free society in which citizens are presumed to be innocent of wrongdoing, adopted the Fourth Amendment.

I. THE FOURTH AMENDMENT PROHIBITS URINALYSIS DRUG TESTING OF CIVILIAN PUBLIC EMPLOYEES IN THE ABSENCE OF A WARRANT AND PROBABLE CAUSE

A. Urinalysis Drug Testing of Public Employees Is a Search and Seizure

Urinalysis drug testing of public employees constitutes a search and seizure within the meaning of the Fourth Amendment because it infringes upon "an expectation of privacy that society is prepared to consider reasonable." [11] *United States* v. *Jacobson*, 466 U.S. 109, 113 (1984). *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Just last Term, this Court flatly "reject[ed] the contention made by the Solicitor General that public employees can never have a reasonable expectation of privacy in their place of work," and held that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *O'Connor v. Ortega*, 107 S. Ct. at 1498 (plurality opinion).[12]

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[11] Such an action need not be carried out by law enforcement officers. School officials, *New Jersey v. T.L.O.*, 469 U.S. at 334-35, building inspectors, *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967), and public employers, *O'Connor v. Ortega*, 107 S. Ct. at 1497, are also subject to the constraints of the Fourth Amendment.

[12] *See also id.* at 1505 (opinion of Scalia, J.) ("There is no reason why th[e] determination that a legitimate expectation of privacy exists should be affected by the fact that the government, rather than a private entity, is the employer."); *id.* at 1509 n.5 (opinion of Blackmun, J.) (expectation of privacy in the workplace by public employees a "commonsense notion").

Urinalysis drug testing of public employees affects that reasonable expectation of privacy in two ways. First, in order to safeguard the integrity of the sampling process, government agents must monitor the physical act of urination either directly or, as required by the scheme in the case at bar, by "listen[ing] for the normal sounds of urination." *Von Raab*, 816 F.2d at 174. Such close surveillance plainly affects employees' expectations that they may urinate in private, expectations that according to one court simply "comport[] . . . with reality." *Taylor v. O'Grady*, 669 F. Supp. 1422, 1434 (N.D. Ill. 1987). Second, through chemical analysis of the urine specimen, government testers open a chemical window into the subject's private life, allowing discovery of a whole range of personal information not otherwise exposed to public scrutiny. In this respect, urinalysis testing is analogous to blood-alcohol testing, which this Court held to be a Fourth Amendment search and seizure in *Schmerber v. California*, 384 U.S. 757, 767 (1966).[13] In view of these substantial injuries to employees' privacy interests, it is not surprising that virtually every one of the many courts to have passed on the issue, including the Fifth Circuit below, *see von Raab*, 816 F.2d at 176, has held that

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[13] *See also Cupp v. Murphy*, 412 U.S. 291 (1973) (police effected a Fourth Amendment search in taking and microscopically analyzing sample of scrapings from suspect's fingernails). While the taking of a urine sample does not require an actual penetration of the body, clearly "[o]ne does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds." *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987). *See also Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986) ("Though urine, unlike blood, is routinely discharged from the body . . ., it is normally discharged and disposed of under circumstances that merit protection from arbitrary interference.").

urinalysis drug testing is a search and seizure under the Fourth Amendment.[14]

B. Urinalysis Drug Testing of Public Employees Is Unreasonable in the Absence of a Warrant and Probable Cause

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. iv. Ordinarily, a search and/or seizure is considered "reasonable" only if accompanied by a warrant issued upon a showing of probable cause. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Nevertheless, many lower courts have addressed the constitutionality of random drug testing programs without first considering the warrant and probable cause requirements —rushing, instead, to an unstructured "balancing" of individual privacy expectations against governmental workplace interests. *See, e.g., McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Policemen's Benevolent Ass'n,*

[14] *See, e.g., Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 579-80 (9th Cir. 1988), *cert. pending*, No. 87-1555 (filed Mar. 17, 1988); *Everett v. Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987), *cert. pending*, No. 87-1706 (filed Apr. 15, 1988); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Taylor v. O'Grady*, 669 F. Supp. at 1434-35; *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560, 1566 (C.D. Cal. 1987); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 586 (N.D. Ohio 1987); *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1523-24 (D. Neb. 1987); *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 732-33 (S.D. Ga. 1986); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. at 1513; *Allen v. City of Marietta*, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984); *City of Palm Bay v. Bauman*, 475 So.2d 1322, 1324 (Fla. Dist. Ct. App. 1985); *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 68-69, 510 N.E.2d 325, 329-30, 517 N.Y.S.2d 456, 461 (1987).

Local 318 v. Township of Washington, 672 F. Supp. 779, 785-86 (D.N.J. 1987); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1520 (D.N.J. 1986). Such balancing necessarily substitutes subjective preferences for the Fourth Amendment's more rigorous commands. The Fifth Circuit's opinion in this case is itself a good example: It simply enumerates a series of factors weighing in the "balance" and then announces an apparently preordained conclusion that the urinalysis testing at issue here is reasonable. *See von Raab*, 816 F.2d at 176-82. As this Court concluded in *Chimel v. California*, 395 U.S. 752, 765 (1969), "[u]nder such unconfirmed analysis, Fourth Amendment protection . . . [will] approach the evaporation point."

1. *"Reasonableness" Is Defined, Both in the Constitution and in the Decisions of This Court, by the Requirements of a Warrant and Probable Cause*

The warrant and probable cause requirements emanate from the Constitution itself. As the Court explained in *United States v. United States District Court*, 407 U.S. 297, 315 (1971), "though the Fourth Amendment speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause"—that "no Warrants shall issue, but upon probable cause."

The requirement of a warrant interposes a "neutral and detached magistrate" between the person being searched and the government agent conducting the search. Searches (and/or seizures) lacking that assurance of temperate objectivity have been pronounced "*per se* unreasonable . . . subject only to a few specially established and well-delineated exceptions." *Katz v. United States*, 389 U.S. at 357. *Accord Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *see also United States v. Karo*, 468 U.S. 705, 717 (1984) (warrantless searches "presumptively unreasonable"). Whenever the

government seeks to invoke such an exception, it must show the necessity of doing so. *See Coolidge v. New Hampshire*, 403 U.S. 443, 445 (1971).

The probable cause requirement has been subject to fewer exceptions still. Even "a search . . . permissibly . . . carried out without a warrant . . . [ordinarily] must be based upon 'probable cause' to believe that a violation of the law has occurred." *T.L.O.*, 469 U.S. at 340.[15] Perhaps more than the warrant requirement,

> "[t]he requirement of probable cause has roots that are deep in our history." *Henry v. United States*, 361 U.S. 98, 100 (1959). Hostility to [searches and seizures] based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest." *Id.*, at 101 (footnotes omitted).

Dunaway v. New York, 442 U.S. 200, 213 (1979). *See Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

2. *Exceptions to the Warrant and Probable Cause Requirements Have Been Confined to Cases Involving Searches and Seizures of Relatively Limited Intrusiveness*

This Court's willingness to forsake the requirements of a warrant and probable cause has been confined to circumstances in which the search and/or seizure at issue constitutes a limited intrusion. Thus, while the Court has validated a warrantless stop and frisk consisting of a "limited search of [a person's] outer clothing," *Terry v. Ohio*, 392 U.S. 1, 24 (1968), or a non-cause vehicle stop for the brief questioning of driver and passengers, *United*

[15] *See, e.g., United States v. Ortiz*, 422 U.S. 891 (1975); *Warden v. Hayden*, 387 U.S. 294 (1967); *Carroll v. United States*, 267 U.S. 132 (1925) (warrantless searches requiring probable cause).

States v. Martinez-Fuerte, 428 U.S. 543 (1976) (fixed check points); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (roving patrols),[16] it has consistently balked at requests that it adopt a balancing test of reasonableness in the context of more intrusive searches.[17] Indeed, in *Dunaway v. New York*, the Court refused to extend the reach of *Terry* to a non-arrest, stationhouse detention of a criminal suspect. The *Dunaway* court expressly noted that in *Terry* and its progeny, the government's conduct had been "judged by a balancing test rather than by the general principle that Fourth Amendment [searches and] seizures must be supported by the 'long-prevailing standards' of [a warrant and] probable cause," because the intrusions in those cases had been "brief and narrowly circumscribed." 442 U.S. at 212 (citation omitted).[18] And in *Brignoni-Ponce*, the Court warned that any detention or search beyond the minimally intrusive stop at issue there would have had to be "based on consent or probable cause." 422 U.S. at 882. *See, e.g., United States v. Ortiz*, 422 U.S. 891 (1975)

[16] In both cases, the Court emphasized that the "intrusion on Fourth Amendment interests" attendant upon such a stop was "quite limited." *Martinez-Fuerte*, 428 U.S. at 557; *see Brignoni-Ponce*, 422 U.S. at 881 (calling stop a "minimal intrusion"). The stop in *Brignoni-Ponce* consisted of questioning "usually consum-[ing] no more than a minute" and a "visual inspection . . . [of] those parts of the vehicle that c[ould] be seen by anyone standing alongside." *Id.* at 880. *See also United States v. Hensley*, 469 U.S. 221, 224 (1984) (momentary stop); *United States v. Place*, 462 U.S. 696, 706-07 (1983) (brief detention of luggage for canine "sniff"); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (*per curiam*) (brief frisk after stop for traffic violation).

[17] In *Arizona v. Hicks*, 107 S. Ct. 1149, 1154 (1987), the Court recently observed that an exception to the probable cause requirement is justified only where the governmental conduct at issue is "minimally intrusive."

[18] As the Court noted in *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979), "*Terry* . . . created an exception to the requirement of probable cause, an exception whose 'narrow scope' this Court 'has been careful to maintain.'" (footnote omitted).

(roving patrol search of vehicles); *Almeida-Sanchez v. United States*, 413 U.S. 266 (fixed checkpoint searches of vehicles).[19]

To justify its departure from the warrant and probable cause requirements, the Fifth Circuit in this case relied in part on the "administrative search" doctrine. *See von Raab*, 816 F.2d at 179-80. Yet, as the court itself acknowledged, the cases upholding limited administrative searches in the absence of a warrant or probable cause have also involved relatively limited intrusions. For example, in *Camara v. Municipal Court*, the Court upheld housing code inspections in the absence of traditional probable cause because those inspections were not "personal in nature [and] . . . involve[d] a relatively limited invasion of the urban citizen's privacy." 387 U.S. at 537. Indeed, the doctrine has been invoked almost exclusively in cases involving the search of commercial property in heavily regulated industries.[20] To apply those cases in the urinalysis drug testing context would expand their scope significantly.[21] As the Court has previously noted, even a

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[19] Full-scale searches conducted at the border, *see United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (applying "reasonable suspicion" standard to border detention beyond scope of routine search and detention) are *sui generis*, given the differing expectations of privacy in a border area and this Court's historical treatment of such searches.

[20] *See, e.g., New York v. Burger*, 107 S. Ct. 2636 (1987) (inspection of automobile junkyard); *Donovan v. Dewey*, 452 U.S. 594 (1981) (inspections of underground and surface mines); *United States v. Biswell*, 406 U.S. 311 (1972) (inspection of licensed gun dealer's storeroom); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (inspection of business premises of liquor licensee); *See v. City of Seattle*, 387 U.S. 541 (1967) (inspection of business for unsafe conditions).

[21] In *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986), the Third Circuit nevertheless upheld the random testing of racehorse jockeys on the basis of the "administrative search" doctrine. The court reasoned that "the pervasive[] regulat[ion]" of the horse racing industry in the state of New Jersey justified abandonment of the warrant and probable cause requirements. *Id.* at 1142. This aberrational decision has been rejected or distinguished by the great majority of courts that have considered it. *See, e.g. Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d at 585; *Feliciano v. City of Cleveland*, 661 F. Supp. at 591; *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. at 734 (calling *Shoemaker* "enigmatic").

"limited search of the person is a substantial invasion of privacy." *T.L.O.*, 467 U.S. at 337.

This Court's decisions in *T.L.O.* and *Bell v. Wolfish*, 441 U.S. 520 (1979), also distinguish the searches and seizures there at issue as having been conducted in relatively unique environments—in the former case, a school, and in the latter, a prison. In *T.L.O.*, the Court observed: "Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of the rules against conduct that would be perfectly permissible if undertaken by an adult." 469 U.S. at 339. And in *Bell*, the Court noted that the need to maintain order in a prison is such that prisoners harbor significantly diminished (if any) expectations of privacy. 441 U.S. at 556-57.

Abandonment of the traditional Fourth Amendment requirements in the context of public employee urinalysis drug testing would violate this Court's long held principle that full-scale, highly invasive searches and seizures are reasonable only if conducted pursuant to a warrant upon a showing of probable cause. As Justice Blackmun observed in *United States v. Place*, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring in judgment), "the Framers of the Amendment balanced the interests involved and decided that a [search or] seizure is reasonable only if supported by a judicial warrant based on probable cause."

3. *This Court's Decision in* O'Connor *Is Fully Consonant with Application of the Warrant and Probable Cause Requirements Here*

The Court's recent decision in *O'Connor v. Ortega* does not abandon this strong presumption in favor of a warrant and probable cause. Nor does it suggest that those requirements would not be fully applicable to a government plan to seize and inspect the urine of its employees. In *O'Connor*, the Court held that a public employer need not procure a warrant or have probable cause to conduct a workplace inspection of an employee's office, desk, or file cabinet. As the plurality pointed out, "fellow empoyees, supervisors, consensual visitors, and the general public . . . may have frequent access to an individual's office." 107 S. Ct. at 1498. No comparable observation can be made about an employee's person, let alone his urine. Moreover, while an employee might avoid the intrusion attendant upon a search of his office, desk, or file cabinet "simply by leaving [his personal belongings] at home," *id.* at 1502, he has no such way of minimizing the intrusion attendant upon the collection and analysis of his urine. Physiological information cannot be shorn at the workplace gate. Thus, the search in *O'Connor*, which this Court viewed as a "'relatively limited invasion' of employee privacy," *id.* (quoting *Camara*, 387 U.S. at 537), fits neatly into the "limited intrusion" cases discussed above. Indeed, the plurality expressly disclaimed any intention to set out the Fourth Amendment standard applicable to the far more intrusive search and seizure effected by drug testing. *See id.* at 1504 n.**.

The *O'Connor* court also agreed that even where a search is but a limited intrusion on privacy, abandonment of the warrant and probable cause requirements is only justified in "'exceptional circumstances in which special needs . . . make [those] requirement[s] impracticable.'" 107 S. Ct. at 1502 (plurality opinion) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment)). In the public employment context,

according to *O'Connor*, the government must show that adherence to those requirements would, at a minimum, interfere with "the efficient and proper operation of the workplace." 107 S. Ct. at 1502.[22] Moreover, given the erosion of Fourth Amendment protection entailed by abandonment of the warrant and probable cause requirements, that interference must not be casually assumed. Thus, traditional Fourth Amendment safeguards must not be compromised in urinalysis drug testing cases where the government has made no threshold showing that there is an actual drug problem among employees to be tested, and that such a problem represents a genuine threat to a bona-fide, work-related interest.

The absence of an actual drug problem within the particular workforce being tested undermines any assertion that the traditional Fourth Amendment protections of a warrant and probable cause must be abandoned in order to maintain "the efficient and proper operation of the workplace." In the absence of a warrant and probable cause, the invasion of privacy attendant upon urinalysis drug testing should require more than a reflexive assertion that our society is rife with illegal drug use. It should require, at minimum, a showing by the government that there is a drug problem among the relevant employees—a showing that has not been made here.

Nor should the warrant and probable cause requirements be abandoned on the basis of non-work-related or only tenuously work-related interests, particularly when the government conduct at issue is as invasive as a urinalysis drug test. In *Rankin v. McPherson*, 107 S. Ct. 2891, 2899 (1987), this Court relied on the lack of an

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[22] The *O'Connor* court had no occasion on the facts before it to determine the appropriate standard when, as here, the government effects a highly invasive search of the person. Presumably, the government's Fourth Amendment burden increases with the intrusiveness of the search. As shown below, however, the government is unable to meet even the *O'Connor* standard in this case.

identifiable injury to the "efficient functioning" of the workplace in holding that the First Amendment barred a public employer from firing or otherwise disciplining one of its employees who had expressed support for the President's assassination. The scope of the government's asserted interests must be similarly limited in the Fourth Amendment context.

Even if the government *could* demonstrate a real, work-related problem caused by drug use within its workforce, there is no reason to believe that either a warrant or probable cause represents an insuperable barrier to addressing that problem. As distinct from the search and seizure at issue in *O'Connor*, where the warrant and probable cause requirements were deemed "unworkable," 107 S. Ct. at 1500, the search and seizure contemplated by urinalysis drug testing is fully compatible with the application of those requirements.

a. *The Government Cannot Show That the Warrant Requirement Is Unduly Burdensome*

In *O'Connor*, the Court concluded that to require the procurement of a warrant every time an "employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome." 107 S. Ct. at 1500; *see id.* at 1506 (Scalia, J., concurring). Clearly an employer need not have the same sort of daily, unimpeded access to an employee's urine as to his office or desk. To require an employer to procure a warrant prior to the collection and analysis of an employee's urine would not entail a comparable disruption or burden.[23] Moreover, while the contents of an office, desk or file cabinet might be spirited away in the time it took to procure a search warrant, evidence of

[23] In addition, any complaint of delay involved in procuring a warrant is especially spurious here because the Customs Service already gives subjects substantial advance notice as an inherent part of pre-transfer testing.

drug use remains in the urine for several days,[24] thereby affording the government ample time in which to obtain a warrant, without appreciably affecting urinalysis results.[25] In sum, it is not unduly burdensome or impracticable for a public employer generally, and the Customs Service in particular, to obtain a warrant prior to administering a drug test.

b. *The Government Cannot Show That the Probable Cause Requirement Substantially Interferes with Workpace Efficiency*

Nor is the probable cause requirement impracticable in the drug testing context. President Reagan's Executive Order authorizing the widespread drug testing of federal employees is replete with references to observable manifestations of illegal drug use—absenteeism, diminished productivity, instability, etc. *See* 51 Fed. Reg. 32,889 (1986). As the court noted in *Lovvorn v. City of Chattanooga*, 647 F. Supp. at 833, "properly designed personnel procedures" will generally permit "detect[ion] [of] such drug abuse symptoms as absenteeism, aberrant conduct, and financial difficulties." *See also Taylor v. O'Grady*, 669 F. Supp. at 1438 (trained supervisors "can usually detect the chronic abusers . . . as well as those who go to work impaired"). Thus, urinalysis drug testing is not

[24] Affidavit of John P. Morgan, M.D. ¶ 5 (J.A. 60-61); Affidavit of Dr. Arthur J. McBay ¶ 12 (J.A. 66).

[25] Thus, for purposes of the warrant requirement, urinalysis drug testing differs from the blood-alcohol testing at issue in *Schmerber v. California*. There, the Court validated a warrantless search because the police were "confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' . . . [T]he percentage of alcohol in the blood," the Court noted, "begins to diminish shortly after drinking stops." 384 U.S. at 770-71. While drug traces and metabolites also dissipate over time, they so do much more slowly, and their concentration, unlike the concentration of alcohol in blood, does not bear on the recency of use or level of intoxication. Affidavit of Dr. Arthur J. McBay ¶ 10 (J.A. 65-66).

the only means by which government employers might identify those persons most probably engaged in illegal drug use.[26] Motor coordination tests, neurobehavioral tests, or even simple questioning may also provide supervisory personnel with probable cause to proceed with a drug urinalysis test.

In *O'Connor*, the plurality reasoned that the probable cause requirement would impose an "intolerable burden" on the government employer because "[t]he delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion [would] be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest." 107 S. Ct. at 1502. Unlike searches of offices, desks or filing cabinets as in *O'Connor*, however, urinalysis drug tests do not yield instantaneous results. Urine samples must be sent to a laboratory and meticulously analyzed before any indication of drug use becomes apparent. And even then, personal interviews may be necessary to ensure that the employees who have tested "positive" have not been taking prescribed medication or ingesting a lawful substance that might have produced such a result. Accordingly, to the extent that delay in correcting employee misconduct may represent an "intolerable burden" on the public employer, suspicionless drug testing does not significantly obviate that problem and abandonment of the probable cause requirement cannot be justified on that basis.

The plurality in *O'Connor* further reasoned that it was "unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard." 107 S. Ct. at 1502. But the Court there was dealing with searches seeking evidence of an unlimited

[26] In this regard, this case is unlike *Camara v. Municipal Court*, wherein the Court emphasized that most housing code violations, such as faulty wiring or plumbing, could not be detected from the outside. 387 U.S. at 537.

variety of work-related misconduct. In the drug testing context, the employer seeks evidence of only one type of misconduct: illegal drug use. Consequently, the government may establish procedures and guidelines in advance to make probable cause determinations much more manageable, just as it now has established complex procedures for administering random drug tests.[27]

II. URINALYSIS DRUG TESTING OF CIVILIAN PUBLIC EMPLOYEES IS PROHIBITED BY THE FOURTH AMENDMENT IN THE ABSENCE OF INDIVIDUALIZED SUSPICION

Even if this Court were to adopt a generalized standard of "reasonableness under all the circumstances," *O'Connor*, 107 S. Ct. at 1502, and undertake a balancing of individual privacy expectations against governmental workplace interests, the scheme at issue here—which requires no individualized suspicion whatever—would still be unconstitutional. As the Court has noted, " 'some quantum of individualized suspicion is usually a prerequisite of a constitutional search and seizure.' " *T.L.O.*, 469 U.S. at 342 n.8 (quoting *Martinez-Fuerte*, 428 U.S. at 560-61).[28]

The random or dragnet search was the central concern of the Fourth Amendment's framers: General warrants or "writs of assistance" had authorized the Crown to search colonists' homes for contraband without any cause

[27] Moreover, application of the warrant requirement to public employee drug testing places ultimate responsibility for the probable cause determination on a neutral magistrate rather than a supervisory employee.

[28] Thus, a police officer may conduct a warrantless stop and frisk only when he "observes unusual conduct which leads him reasonably to conclude in light of his experience . . . that *the persons with whom he is dealing* may be armed and presently dangerous. . . ." *Terry*, 392 U.S. at 30 (emphasis added). And a roving patrol whose purpose it is to ferret out illegal aliens may conduct a vehicle stop only when there is reason to believe that the particular vehicle is carrying illegal aliens. *See Brignoni-Ponce*, 422 U.S. at 882-83.

to believe that a particular house contained such contraband. *See T.L.O.*, 469 U.S. at 335; *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978); *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). Thus, the proponent of such a search bears a heavy burden. As the Court observed in *T.L.O.*, "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal." 469 U.S. at 342 n.8.[29] The privacy interests implicated by urinalysis drug testing cannot be so characterized; they clearly outweigh the governmental interests thereby served.

A. The Privacy Interests Infringed by Urinalysis Drug Testing Are Substantial

As noted above, employee privacy interests are first infringed at the collection stage of the drug testing process. In the words of the Fifth Circuit below:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a private function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Von Raab, 816 F.2d at 175. Even if a particular testing program eschews visual inspection of the urination process, it necessarily provides for close observation of that anatomical function.[30] For without such observation, the

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[29] Inasmuch as the search at issue in *O'Connor* was predicated on an individualized suspicion of misconduct, the plurality had no occasion to decide whether such suspicion was an "essential element" of its generalized standard of "reasonableness." *See* 107 S. Ct. at 1503. The four dissenting justices would have required that the search be grounded in probable cause. *See id.* at 1511 (Blackmun, J., dissenting).

[30] Thus, in *American Federation of Gov't Employees v. Weinberger*, 651 F. Supp. at 734, the court held that the "very

risk of inaccurate results would be greatly heightened, and consequently, the utility of those results significantly diminished: Drug users fearing detection could submit adulterated or otherwise altered samples.[31] Thus, the drug testing program at issue here requires each subject to urinate in the presence of a note-taking monitor who, among other things, is to "listen for the normal sounds of urination." *Von Raab*, 816 F.2d at 174.

Once a urine sample is collected, employee privacy interests are further infringed by the chemical analysis performed upon it. Such analysis effectively "provide[s] [the employer] with a periscope through which [it] can peer into [the employee's] behavior in [his] private li[fe], even in [his] own home." *Jones v. McKenzie*, 833 F.2d 335, 339 (D.C. Cir. 1987), *cert. pending*, No. 87-1706 (filed Apr. 15, 1988). *See also Feliciano v. City of Cleveland*, 661 F. Supp. 578, 589 (N.D. Ohio 1987) (comparing analysis of employee's urine with entry into employee's home). It allows the government to monitor off-duty conduct not otherwise exposed to public scrutiny. *Cf. Katz v. United States*, 389 U.S. at 361 (noting reasonable expectations of privacy in activities conducted at home and lack of such expectations in activities

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taking of [a] . . . sample," notwithstanding the absence of any "direct observation" of the tested employees, creates a "quite substantial intrusion." *See also Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y. 2d at 69, 510 N.E.2d at 330, 517 N.Y.S.2d at 461 (concluding that privacy interests infringed "[e]ven when the individual is permitted to [urinate] in private," so long as act is performed "at the command and [under the] supervision of a person designated by the State").

[31] Of course, the less reliable a testing program is in detecting drug users, the less effectively will it serve the government's asserted interest in a drug-free workplace. And as Justice White observed in *United States v. Ortiz*, 422 U.S. at 915 (White, J. concurring), "[p]erhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness. . . ."

"expose[d] to the 'plain view' of outsiders") (Harlan, J., concurring). As one court has noted:

> We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's "Big Brother" society come to life.

Capua v. City of Plainfield, 643 F. Supp. at 1511.

Moreover, the government's surveillance necessarily extends beyond illegal drug use. Chemical analysis simply cannot distinguish between lawful and unlawful ingestions of the same substance.[32] Thus, an employee who, pursuant to a doctor's orders, uses a substance such as morphine (covered by the Customs Service program), will produce as "positive" a result as an employee who uses the same substance without a prescription.[33] That em-

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[32] Affidavit of John P. Morgan, M.D. ¶¶ 6, 7 (J.A. 61); Affidavit of Dr. Arthur J. McBay ¶¶ 7, 9 (J.A. 64-65).

[33] Similarly, people who have eaten a poppy seed bagel will often test "positive" for illegal drug use even under the government's supposedly foolproof gc/ms confirmatory test because poppy seeds and opiates are chemical "look-alikes." *See* Struempler, *Excretion of Codeine and Morphine Following Ingestion of Poppy Seeds*, 11 J. Analytical Toxicology 97 (1987). The government has tried to play down the statistical significance of such false positive readings by noting their infrequency relative to the number of tested employees. The proper gauge of their statistical significance, however, is their frequency relative to the number of tested employees who actually use illegal drugs. Baye's Theorem indicates that as a given test is applied randomly to a progressively more innocent population, the ratio of false positives to real ones increases, and the predictive value of the test accordingly decreases. If, for example, a false positive reading occurred in 1% of tests, but only 1% of the tested employees actually used illegal drugs, then for each employee correctly deemed an illegal drug user, another employee would be falsely accused. These percentages are far from specula-

ployee will then be forced to reveal otherwise confidential medical information or, alternatively, to suffer the consequences attendant upon such a "positive" indication of illegal drug use. *See Capua*, 643 F. Supp. at 1515 ("[C]ompulsory urinalysis forces [employees] to divulge private, personal medical information unrelated to the government's professed interests in discovering illegal drug abuse.").[34] The compelled disclosure of such information invades a right of privacy previously recognized by this Court in *Whalen v. Roe*, 429 U.S. 589, 598-600 & nn. 24-25 (1977).

B. The Government's Interests Do Not Overcome the Presumption Against Invasive Searches and Seizures in the Absence of Some Degree of Individualized Suspicion

Because of the fundamentally intrusive nature of random drug testing, such searches cannot be upheld absent a showing that compelling governmental interests are implicated and that those interests have a close nexus to the drug testing contemplated. As examples of a carefully crafted approach to balancing, the decisions of the district courts in *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987), and *National Federation of Federal Employees v. Carlucci*, Civ. Action No. 86-0681 (D.D.C. Mar. 1, 1988), merit this Court's attention. In both of those cases, the courts reviewed separately each of the alleged governmental interests and assessed its relative strength and the extent to which it would be served by drug testing, or could be better served by alternative and less intrusive means of employee supervision. *Taylor*

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tive; in the Transportation Department's first round of drug testing, only two positive results appeared out of 221 test results, and one of those was attributable to a codeine painkiller administered by the employee's dentist. N.Y. Times, Nov. 5, 1987, at A16.

[34] Many drug testing programs, including the one at issue here, require the employee to complete a medical information form prior to chemical analysis of the urine sample. Such an employee is thereby forced to reveal personal or private information even before a "positive" result makes such a revelation strictly necessary.

and *Carlucci* stand in sharp contrast to the hodgepodge approach of the Fifth Circuit's decision below. The court of appeals simply threw into the pot every conceivably relevant Fourth Amendment doctrine—consent, administrative search, highly regulated industry, etc.—and concocted a Fourth Amendment stew bound to mislead the district courts and to invite public employers to pick whatever rationale they find most convenient in each drug testing case.

While legitimate governmental interests would be implicated if individuals charged with drug enforcement responsibility were themselves drug users, that fact alone does not justify the invasion of privacy attendant upon drug testing. At the outset, the government should be required to show that its legitimate interests are in fact threatened by illegal drug use and that its mission as employer is effectively compromised. Here, it expressly acknowledged the absence of a drug problem within the Customs Service, *see von Raab*, 816 F.2d at 173, thus dismissing the very evil that its program was designed to correct.

Moreover, even if the government were able to demonstrate an actual drug problem, a urinalysis drug testing program such as the one at issue here would not be justified in the absence of individualized suspicion. Three interests are generally advanced in support of government-sponsored drug testing programs: first, the interest in having employees who, while at work, are able to exercise full control of their faculties; second, the interest in having employees who will not breach government security as a result of blackmail or bribery related to illegal drug use; and third, the interest in avoiding a public perception that government employees lack integrity.[35] None of these interests is sufficient to withstand close scrutiny.

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[35] As noted *supra* at 17-18, the government cannot claim any special authority as an employer insofar as its interests are not employment-related. Thus, in contrast to the facially legitimate government interests discussed above, this Court should disapprove *per se* the government's recurring reliance on that aspect of the "exemplar" or "integrity" rationale for drug testing which declares that the government is entitled to ensure that its employees are drug-free in order to set a public example. It is doubtful that the government, *as employer*, has any legitimate interest in demonstrating that its employees are drug-free, as opposed to preventing the various *consequences* of drug use that affect their work and the employer's operations. The "exemplar" rationale in this tautologous form especially invites overuse and abuse, as it cannot readily be reviewed for any factual basis.

First, there are alternative, less invasive means available to government employers to identify those drug users who present the most serious risks in terms of on-the-job performance, susceptibility to blackmail and/or bribery, and negative public perception: *i.e.*, employees who are chronic abusers or who are impaired by drugs while at work. Insofar as such means would substantially meet the government's legitimate objectives, the Fourth Amendment mandates their use and renders random urinalysis testing unlawful. In *Delaware v. Prouse*, 440 U.S. 648, 659 (1979), the Court found unconstitutional a state's program allowing random stops of automobiles because the state had "alternative mechanisms available" that effectively achieved most, if not all of its objectives, and in *Camara v. Municipal Court*, 387 U.S. at 537, it upheld an area search only because there was no other alternative that would "achieve acceptable results."

Second, as the evidence in this case shows, urinalysis drug testing simply does not measure on-the-job impairment or inadequate job performance.[36] Urinalysis tests measure metabolites and drug traces that may be excreted in the urine days or even weeks after the drug has left the brain and blood stream, well after any psychoactive effect of the drug has subsided. Indeed, sev-

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[36] Affidavit of John P. Morgan, M.D. ¶ 4 (J.A. 60); Affidavit of Dr. Arthur J. McBay ¶ 10 (J.A. 65-66).

eral lower courts have recognized that urinalysis testing is incapable of identifying impaired ability, and have relied on that fact in invalidating random testing programs.[37]

Third, as for the government's concern about a public perception that its employees lack integrity, drug testing cannot be shown to address that problem. On the contrary, it is as likely that the institution of a drug testing program will create such a perception where it might not otherwise exist. Implicit in a requirement that employees must submit to random testing is a message that those employees do not have enough integrity to be trusted.

Finally, the government's arguments simply prove too much. Employees can be at risk of being suborned for many reasons unrelated to drugs, such as financial problems or adultery. Yet the government does not, and could not, assert a right to seize randomly employees' bank statements or love letters.

The government's concern with preventing employee drug use from impairing its operations is both understandable and commendable. That concern is not what this case is about, however. At issue here is whether the Fourth Amendment tolerates, in the absence of individ-

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[37] *See, e.g., National Fed'n of Fed. Employees v. Carlucci*, Civ. Action No. 86-0681, slip op. at 38 ("At this stage of the scientific development of drug testing, urinalysis testing does not advance th[e] interest [in workplace performance] because there is no convincing evidence that a positive result can *ipso facto* be equated to on-duty impairment."); *see also Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d at 588 ("[U]rine tests intended to establish drug use . . . are not reasonably related to the stated purpose of the tests because [they] cannot measure current drug intoxication or degree of impairment."); *Jones v. McKenzie*, 833 F.2d at 339 (forbidding use of immunoassay drug tests on the ground that such tests could not advance the government's legitimate aim of identifying drug-related dysfunction).

ualized suspicion, a search and seizure as invasive as urinalysis drug testing. As one court has observed: "The question . . . is not *whether* [illegal] drug use . . . is incompatible with [government] employment. Rather, the question is *by what means* is it permissible to come by evidence of such drug use." *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 735 (S.D. Ga. 1986) (emphasis in original). Random drug testing is not a permissible means.

CONCLUSION

For the reasons stated herein, the decision of the Fifth Circuit below should be reversed and the judgment of the district court enjoining the Customs Service drug testing program reinstated.

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NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Petitioners,

v.

WILLIAM VON RAAB,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the Public Employee Department of the AFL-CIO, and the American Federation of Government Employees, AFL-CIO submit this brief *amici curiae* with the consent of the parties as provided for in the Rules of this Court.

INTEREST OF THE *AMICI CURIAE*

The AFL-CIO is a federation of 90 national and international unions representing over 14,000,000 working men and women. The Public Employee Department, AFL-CIO is a department of the AFL-CIO composed of 32 unions, representing approximately 4,000,000 workers employed by the federal government and by state and local government. The American Federation of Government Employee is a national union affiliated with the AFL-CIO and its Public Employee Department, which represents approximately 700,000 workers employed by the federal government. These three *amici curiae* share a keen interest in protecting the privacy and dignity interests of public and private employees.

ARGUMENT

A. Introduction and Summary

During the past several years, public concern over the problem of illegal drug use in this society has with increasing frequency led governments at all levels to adopt rules requiring certain categories of employees, on demand, to provide a sample of their urine to their employer to be tested for the presence of various chemicals including, but by no means limited to, the by-products of illegal drugs (known as metabolites). This govern-

ment-mandated drug testing has generated a large volume of constitutional litigation in the federal and state courts.

Significantly, this litigation has *not* focused on the question most-often debated in Fourth Amendment jurisprudence: *viz.*, the "quantum of evidence [required] for the belief justifying [a] search." *Griffin v. Wisconsin*, —— U.S. ——, 55 L.W. 5156, 5158 n.4 (June 23, 1987). In virtually every case of which we are aware, those challenging a drug-testing program have acknowledged—as petitioner here did in the court below, *see* 816 F.2d at 177—that whenever a public employer has a reasonable basis for an "individualized suspicion," *O'Connor v. Ortega*, —— U.S. ——, 55 L.W. 4405, 4410 (March 31, 1987), that an employee is under the influence of illegal drugs, the government's interest, as employer, predominates, and the government may test the employee without the need for either a warrant or probable cause.

Instead, what has been debated in the drug testing cases is a question this Court expressly reserved in *O'Connor v. Ortega*, *supra*: under what circumstances, if any, may a public employer invade an employee's expectation of privacy in the *absence* of "individualized suspicion." The lower courts have reached divergent answers to that question.[1]

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[1] The following courts have invalidated drug testing programs in which testing takes place without any individualized suspicion: *Thomson v. Weinberger*, —— F. Supp. ——, 3 Ind. Emp. Cases 7 (D. Md. March 28, 1988); *Federal Employees v. Carlucci*, —— F. Supp. ——, 2 Ind. Emp. Cases 1709 (D.D.C. March 1, 1988); *Policemen's Benevolent Ass'n v. Township*, 672 F. Supp. 779 (D.N.J. 1987); *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987); *Feliciana v. Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987); *Government Employees v. Weinberger*, 651 F. Supp. 578 (N.D. Ohio 1987); *Government Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1096); *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986); *Lovorn v. Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Wrightsell v. Chicago*, No. 87 C 3532 (N.D. Ill., Jan. 21, 1988); *Transit Union*

The divisions among those courts is the result of a substantial difference of opinion on the two basic questions posed by *Ortega*. First, to what extent does a government-mandated drug test "inva[d]e the employee's legitimate expectations of privacy?" 55 L.W. at 4408. And second, to what extent does such a test advance "the government's need for supervision, control and the efficient operation of the workplace?" *Id.*

Because of its unique circumstances, this case provides a distorting prism through which to consider either of these questions. The privacy issue here must be considered in the context of a program which—unlike any other drug testing program that has been subject to con-

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Local 1277 v. Sun Line Transit Agency, 663 F. Supp. 1560 (C.D. Cal. July 7, 1987); *Patchogue-Medford Congress of Teachers v. Board of Education*, —— N.Y. ——, 517 N.Y.S. 2d 456 (1987); *cf. FOP v. Newark*, 216 N.J. Super. 461, 524 A.2d 430 (1987); *City of Palm Bay v. Bauman*, 475 So.2d 1322 (Fla. 1985) (state constitutional decisions). *See also Railway Labor Executives Association ("RLEA") v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *petition for cert. pending*, No. 87-1555 (requiring individualized suspicion before government may compel private railroads to test their employees).

Other courts have upheld random drug testing programs as constitutionally reasonable. *See McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Burka v. New York City Transit Authority*, —— F. Supp. ——, 2 Ind. Emp. Cases 1625 (S.D.N.Y. Feb. 1, 1988); *Transit Workers v. Septa*, 2 Ind. Emp. Cases 1804 (E.D. Pa. Jan. 19, 1988); *Government Employees v. Dole*, 670 F. Supp. 445 (D.D.C. 1987), *app. pending*, No. —— (D.C. Cir.); *Mulholland v. Army*, 660 F. Supp. 1565 (E.D. Va. 1987). *Cf. Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (upholding drug testing as part of annual physical examination so long as test measures drug impairment); *Air Traffic Specialists v. Dole*, —— F. Supp. ——, 2 Ind. Emp. Cases 68 (D. Alaska March 21, 1987) (upholding drug testing as part of annual physical examination).

Two courts have upheld random drug testing on the grounds that the employees being tested worked in a heavily regulated industry in which no privacy interests exist. *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986) (horse racing); *Rushton v. Nebraska Public Power District*, 653 F. Supp. 1510 (N.D. Feb. 1987) (nuclear power plants).

stitutional challenge—applies only to a self-selected subgroup of employees: those who voluntarily apply for a promotion to a new job for which some inquiry into the employees' fitness for duty must be conducted.[2] And the governmental interest here, too, is colored by the employer's—the United States Customs Service's—unique "top priority," which as the court below stated, "is the interdiction of narcotics smuggling," 816 F.2d at 173, and by the corollary that some of the jobs in question "directly involve the interdiction of illicit drugs," *id.*

The parties to this case, rather than the *amici curiae*, are best able to address the significance of these unusual facts to the constitutional question here posed. The parties are most familiar with the record in this case and are best situated to discuss such issues as the privacy expectations of the applicants for the jobs for which drug testing is here required; the extent to which drug use by employees poses a problem for the Customs Service; and, taking into account the nature of the jobs affected, whether the particular regime of drug testing involved here serves to promote the Customs Service's unique mission.

[2] Indeed, of these applicants, only those who are tentatively selected for promotion are required to undergo the test, and before being so required these individuals are permitted to withdraw their application for promotion and thereby avoid the test.

In focusing attention on the fact that the individuals being tested in this case are job applicants, we do not mean to suggest that by applying for a job (or a promotion) an employee *consents* to any tests (or other intrusions) which are required of all those applying. Consent, of course, constitutes a waiver of Fourth Amendment rights, and this Court has made clear that "the Fourth and Fourteenth Amendments require that a consent not be coerced by explicit or implicit means, by implied threat or covert force." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). Thus, "submission to a claim of lawful authority" does not constitute a valid consent, *Florida v. Royer*, 460 U.S. 491, 497 (1983); "[a]ny 'consent' given in the face of 'colorably lawful coercion' cannot validate" a search, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979).

The relevant question here, then, is whether, because they have voluntarily applied for a new job, the employees being tested have diminished expectations of privacy *not* whether they have waived any expectations of privacy that the employees, in fact, enjoy.

We therefore leave those matters to the parties. For purposes of our analysis, as *amici curiae*, we address, instead, the privacy and governmental interest issues in the *run of drug testing cases*. In doing so, we recognize of course, that the Court generally decides constitutional cases as narrowly as the case permits and that this prudential rule is particularly applicable in Fourth Amendment cases where, "what is reasonable depends on the context within which a search takes place," *O'Connor v. Ortega*, *supra*, 55 L.W. at 4408. Nonetheless two considerations cause us to believe that in deciding this case it would be helpful to the Court to be informed about the larger issues posed by government-mandated drug testing generally. First, in light of the rush of drug testing litigation, the Court may wish to use the occasion of its first drug testing case to provide a measure of general guidance on the questions that have divided the lower courts to date. And, however the Court approaches this case, lower-court judges as well as legislators and administrators are certain to attempt to divine from this Court's decision in the instant case guidance as to what is constitutionally permissible in other contexts as well.

Against this background our analysis proceeds as follows:

We first show that in the run of cases, government-mandated drug testing involves a substantial intrusion on the interests protected by the Fourth Amendment. Being compelled to produce a urine sample for analysis represents a substantial invasion of one's privacy and dignity; the normal expectation in our society is that an individual will be free to urinate as the need arises (and not on command), will be afforded privacy in urinating

if she so desires, and will be free to dispose of the urine at the conclusion of the process. Furthermore, the fact that as the result of this intrusion one's urine will be subject to chemical analysis in which personal, physiological secrets may be revealed makes the overall invasion of privacy that much greater. And the psychological intrusion is especially great when, instead of testing all employees in a particular job category, the testing is of a randomly-selected subgroup. That drug testing occurs in the employment context in no way diminishes the privacy expectations that are infringed. Part B, pp. 7-14 *infra*.

In Part C we demonstrate that although the interests of the government, as employer, that are proffered to justify drug testing are substantial, those interests are not appreciably furthered by testing employees' urine for the presence of drug metabolites. The only information that can be obtained from the test—that the individual used marijuana (or some other drug) within several days (or weeks) of being tested—is not a reliable indicator of any fact of relevance to the government as employer. And the information that the government seeks to glean from drug testing can be ascertained through procedures that are more precise and less intrusive. Pp. 14-23 *infra*.

In Part D we consider the two supposed analogies advanced by the Solicitor General to defend the constitutionality of drug testing programs. As we show, requiring employees to submit to government-mandated drug tests does not stand on an equal constitutional footing with requiring periodic physical examinations because physicals are administered in a medical context, by medical personnel, for medical reasons, and the results are subject to the constraints of the medical profession with respect to disclosure. And drug testing is quite different than administrative searches because of the degree of intrusion involved and the limited need for such testing. Pp. 23-27 *infra*.

Finally, in Part E we draw the conclusions from this analysis. Given the strong privacy expectations and limited government interest that is at stake, the Fourth Amendment does not permit government-mandated drug testing absent any basis to suspect a particular employee of wrongdoing; Fourth Amendment freedoms are simply too precious to permit so massive an invasion for so limited a gain. Indeed, even if drug testing yielded information that was highly valuable to the government, the degree of intrusion is such that only where there is reason to suspect that the search of a particular individual will uncover proof of drug use could such a search be deemed constitutionally reasonable. Pp. 27-30 *infra*.

B. The Fourth Amendment Interests

It facilitates analysis of "the nature and quality of the intrusion on the individual's Fourth Amendment interests," *O'Connor v. Ortega*, *supra*, 55 L.W. at 4408, effected by a drug testing requirement, to proceed in two steps: first, to consider the constitutional ramifications of a government-mandated drug-testing program directed at the public at large; and second, to consider to what extent, if at all, the fact that compulsory drug testing is aimed at public employees alters the constitutional calculus.[8]

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[8] We recognize that before addressing the "nature and quality of the intrusion on the individual's Fourth Amendment interests," there is a threshold question that must be considered: does a drug testing requirement "infringe[] 'an expectation of privacy that society is prepared to consider reasonable,'" so as to constitute a "search." *See O'Connor v. Ortega*, *supra*, 55 L.W. at 4407. In its brief in opposition to the petition for a writ of certiorari, the Solicitor General preserved his claim that drug testing "does not violate employees' reasonable expectations of privacy." Br. in Opp. at 7 n.6.

That the Solicitor General would question whether drug testing constitutes a search is little short of remarkable in light of *Cupp v. Murphy*, 412 U.S. 291 (1973), in which this Court concluded that the simple act of taking a scraping from underneath a finger-

1. Given the level of public concern over drug use in the society, it is certainly conceivable that some governmental entity might require some or all persons who appear at a polling place to cast their ballots—or some or all persons who seek to contract with the government or to qualify for government loans—to first submit to a drug test. Such hypotheticals put in bold relief the Fourth Amendment implications of government-mandated drug testing.

"Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom," *Ker v. California*, 374 U.S. 23, 32 (1963), and its concern that "personal privacy and dignity" be safeguarded "against unwarranted intrusion by the State," *Schmerber v. California*, 384 U.S. 757, 767 (1966). The Fourth Amendment thus expresses our pro-

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nail "constituted the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." *Id.* at 295. Not surprisingly, the government's argument that drug testing is not a search was rejected by the court below, 816 F.2d at 175-76, and has been rejected by at least four other appellate courts, *see RLEA v. Burnley, supra*, 2 Ind. Emp. Cases at 1604; *Everett v. Napper*, 835 F.2d 1507, 1511 (11th Cir. 1987); *McDonnell v. Hunter, supra*, 809 F.2d at 1307; *Federal Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *cf. Shoemaker v. Handel, supra*, 795 F.2d at 1140; *Division 241, Transit Union v. Susey*, 538 F.2d 1264, 1267 (7th Cir. 1976), and by every district court to consider the question, including those courts that have upheld drug testing programs, *e.g., Government Employees v. Dole, supra*, 670 F. Supp. at 447; *Mulholland v. Army, supra*, 660 F. Supp. at 1569; *Rushton v. Nebraska Public Power District, supra*, 653 F. Supp. at 1523-24.

Indeed, the Solicitor General himself seems to have abandoned the contention in his recent petition for a writ of certiorari in *Burnley v. RLEA*, Supreme Court No. 87-1555, in which he attacks the Ninth Circuit's decision in that case solely on the grounds that the drug testing at issue there is constitutionally reasonable.

For all these reasons, we focus here on the *extent* of the intrusion of privacy effected by a drug testing program; that some such intrusion exists follows *a fortiori* from our showing in text on that issue.

found commitment to individual liberty and to each individual's inherent worth and our equally profound dedication to a government of limited powers bound by the rule of law and subservient to its citizens, rather than dominant over them. That being so "[t]his Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen.'" *Harris v. United States*, 331 U.S. 145, 150 (1947), *quoting Gouled v. United States*, 255 U.S. 298, 304 (1921). There can be no doubt that drug testing cuts deeply into these core valuues protected by the Fourth Amendment and does so in several different respects.

First, compelling an individual on-the-spot to produce a urine sample under government supervision necessarily involves a significant "intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." *Winston v. Lee*, 470 U.S. 753, 761 (1985). Demanding a urine specimen is entirely unlike demanding *e.g.*, a hair sample or a fingernail scraping because an individual's control over her own bodily functions, such as urination, is an essential part of human dignity. Gaining such control marks an important step in the maturation process (as Freud made particularly clear), and losing control (*viz.*, becoming incontinent) is a particularly humiliating experience for the aged or the infirm. *See, e.g.*, Freud, *From The History of An Infantile Neurosis*, 17 Standard Edition of The Complete Psychological Works of Sigmond Freud (J. Streachey, ed.) (London, 1955), p. 92. Children urinate when told to do so and ask permission to do so at other times; adults do neither. Children likewise are supervised while they urinate; adults are not. Thus, forcing an individual to urinate on government command, at a time and place chosen by the government, under some form of government-monitoring,

and then to preserve and hand over the urine to the government is an affront to our basic conception of what it means to be a mature, independent member of this society.

Second, these dignitary concerns are heightened still further where, as is often true, as part of a drug testing program a government agent actually watches the individual subject to the test while she urinates.[4] As the court below observed:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed its performance in public is generally prohibited by law as well as social custom. [816 F.2d at 175.]

Under such a regime, moreover, the individual being tested is, of necessity, required to expose her anatomy to some stranger and "[i]n a civilized society, one's anatomy is draped with constitutional protections." *Policemen's Benevolent Ass'n v. Township, supra*, 672 F. Supp. at 787, *quoting United States v. Afandor*, 567 F.2d 1325, 1331 (5th Cir. 1978).

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[4] The record in this case contains testimony from several experts stating that in order to assure reliability of drug testing results, an "observer must have his or her eyes within inches of the [urination] process" so as to be certain that the individual being tested does not attempt to substitute another individual's urine or to alter his or her sample with, *e.g.*, salt or soap. Affidavit of Dr. John P. Morgan, October 16, 1986, ¶ 3, J.A. 60; *see* Affidavit of Dr. Arthur J. McBay, October 13, 1986, ¶ 11, J.A. 66.

The Customs Service has concluded that "'close' but not 'direct'" monitoring of the urination process suffices. Affidavit of Janet Werner, November 3, 1986, ¶ 4, J.A. 74; "under the Service's program an observer remains in the restroom to listen for the normal sounds of urination and to collect the sample immediately after urination, but the observer does not visually observe the act of urination," 816 F.2d at 174.

Third, the process of chemically analyzing urine implicates an individual's expectations of privacy in an entirely separate way. As the court below stated:

> Urine testing may disclose not only the presence of drug traces but much additional personal information about an employee—whether the employee is under treatment for depression or epilepsy, suffering from diabetes, or, in the case of a female, pregnant. Even tests limited to the detection of controlled substances will reveal the use of medications prescribed for relief of pain or other medical symptoms. [816 F.2d at 175-76.]

And in our society—indeed in any civilized society—one "does not 'reasonably expect to discharge urine under circumstances making . . . discover[y of] the 'personal physiological secrets it holds' possible." *Id.* at 175.[5]

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[5] Even insofar as urinalysis reveals information about drug use, the analysis "is 'a form of surveillance,' which 'reports on a person's off-duty activities' in the privacy of his home just as surely as [if] someone had been present and watching.'" *Jones v. McKenzie, supra*, 833 F.2d at 339.

To be sure, this Court has concluded that individuals have no "legitimate privacy interest" in whether a substance which is in the individual's possession is contraband or something other than contraband, and that therefore a procedure which can ascertain that fact, and nothing more, does not constitute a search. *United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *see United States v. Place*, 462 U.S. 696 (1983). But it is far from clear that this principle extends to procedures designed to ascertain whether an individual has engaged in certain unlawful activities in the privacy of his or her home; if *Jacobsen* and *Place* were so extended, the government would be free, *e.g.*, to tap phones or bug homes—without any basis for suspecting wrongdoing—if technology could be developed which would pick up only illicit conversations and nothing more. Nothing in this Court's decisions suggest a willingness to cut so deeply into the protection traditionally provided by the Fourth Amendment.

In any event, it is not necessary to explore these questions here because, as noted in text, "[e]ven tests limited to the detection of controlled substances will reveal the use of medications prescribed for relief of pain or other medical symptoms."

Fourth, "random selection . . . for drug testing is the 'heart and soul' " of most drug testing programs and that method of selection "is also the 'heart and soul' of the constitutional question in most drug-testing cases," *Policemen's Benevolent Assn. v. Township*, *supra*, 672 F. Supp. at 785. Like random automobile spot checks, random drug testing—which singles out particular individuals for searching scrutiny—naturally "generat[es] concern or even fright on the part" of those subject to the test. *Delaware v. Prouse*, 440 U.S. 618, 657 (1979). Such a deep "psychological intrusion," *id.*—which is inherent in any form of random testing—is of independent constitutional moment. As the Court has made clear, the Fourth Amendment's prohibition on unreasonable searches and seizures "limit[s the government's] use of unnecessarily frightening or offensive methods of surveillance and investigation." *United States v. Ortiz*, 422 U.S. 891, 894 (1975).

Fifth, and finally, insofar as a random drug testing program leaves government officials free, in their discretion, to decide who will be tested, additional Fourth Amendment values are implicated. "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). That "basic purpose" cannot be accomplished if privacy interests are subject to invasion "at the unfettered discretion of officers in the field," *Brown v. Texas*, 443 U.S. 48, 51 (1979); such "unfettered discretion" is "precisely the evil" the Court has condemned in a variety of contexts, *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *see also, e.g., United States v. Ortiz*, *supra; Delaware v. Prouse*, *supra; Marshall v. Barlow's Inc.*, 435 U.S. 307 (1978).

For all of these reasons, there can be no doubt that, at least outside of the employment context, any form of government-mandated drug testing program severely in-

trudes into the interests protected by the Fourth Amendment and that random testing in particular raises the most serious of Fourth Amendment concerns.

2. In opposing the petition for certiorari, the Solicitor General seemed to suggest that the Fourth Amendment interests at stake are diminished because this case arises in "the employment context." Br. in Opp. at 9. That suggestion is mistaken.

Just last Term, this Court emphatically "reject[ed] the contention made by the Solicitor General . . . that public employees can never have a reasonable expectation of privacy in their place of work." *O'Connor v. Ortega*, *supra*, 55 L.W. at 4408. The Court there held that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Id.* The Court, to be sure, went on to observe that "[t]he operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor;" the Court elaborated on that observation by noting that "[p]ublic employees' expectations of privacy in their offices, desks and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* (emphasis in original). But of particular significance here the Court was careful to point out that:

> Not everything that passes through the confines of the business address can be considered part of the workplace context . . . An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way. *The appropriate standard for a workplace search does not nec-*

essarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer's business address. [55 L.W. at 4407; second emphasis added]

What is true of the luggage, handbags, and briefcases a public employee brings to work is even more true, we submit, of her anatomy and of the fluids (including urine) that are contained in her body when she comes to work; employees do not come to work expecting to be required to expose themselves and surrender some of those fluids to the employer so as to divulge to the employer the "personal, physiological secrets," p. 11 *supra*, contained therein. Rather, the normal expectation in our society is that at one's place of work, as at home, an individual will be free to urinate as the need arises (and not on command), will be afforded privacy in urinating if she so desires, and will be able to dispose of the urine in a way that does not permit its chemical analysis by others.

C. The Governmental Interests

This is *not* to say that the fact that drug testing takes place in the employment context is irrelevant to Fourth Amendment analysis. To the contrary, " 'the balancing of competing interests' [i]s 'the key principle of the Fourth Amendment,' " *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). The *other* side of the Fourth Amendment balance here focuses on "the governmental interests alleged to justify the intrusion." *O'Connor v. Ortega*, *supra*, 55 L.W. at 4408. In identifying and weighing those interests we recognize that it is of the essence that the government is acting as an employer.

If the sole governmental interest at stake here were that of identifying and punishing (through the use of employment sanctions) individuals who had committed a legal wrong, *viz.*, had smoked marijuana or used some other illegal drug, this would be the easiest of cases. This Court's decisions make clear that the government's "normal need for law enforcement," *O'Connor v. Ortega*, 55 L.W. at 4410, *cannot* overide the probable cause requirement of the Fourth Amendment. What complicates this case is that the government here asserts a "special need[]" to conduct drug testing in order "to ensure the efficient and proper operation of the workplace." *Id.* And this Court has made clear that constitutional balancing called for by the Fourth Amendment must "accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the [Bill of Rights]." *Rankin v. McPherson*, —— U.S. ——, 55 L.W. 5019, 5021 (June 24, 1987).

It is thus a given that public employers have a "substantial government interest[]," *O'Connor v. Ortega*, *supra*, 55 L.W. at 4410, in the efficient operation of their workplaces. But, as this Court has stated (in evaluating an automobile checkpoint stop), "The question remains . . . whether in the service of th[is] important end[] the [search] is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such [search] entail." *Delaware v. Prouse*, *supra*, 400 U.S. at 569. In other words, "[c]onsideration of the constitutionality" of a search "involves a weighing" not only of "the gravity of the public concerns served by the [search]," but also of *"the degree to which the [search] advances the public interest."* *Brown v. Texas*, *supra*, 443 U.S. at 50 (emphasis added). It is to that question that we now turn.

1. In order to assess the extent to which drug testing furthers the interest of the public employer in the efficient functioning of the workplace, it is useful to begin by considering what information can and cannot be obtained from a drug test. In doing so we assume that the drug testing program is administered in such a manner as to insure the reliability of the test results: *viz.*, that proper procedures are instituted to prevent the substitution or contamination of urine specimens, *see* n. 4,

p. 10 *supra*, that the chain-of-custody once a urine specimen is turned over to the employer is safeguarded, that a reliable and competent laboratory does the test and that a reliable method of analysis is used.[6]

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[6] That "strict chain-of-custody procedures" are needed to insure the reliability of a drug testing program is self-evident; such procedures assure that those analyzing a specimen are able to identify the individual who gave the specimen. Equally important is the quality of the laboratory retained to do the analysis and the method of analysis used; a few words are in order as to why that is so.

Because "the number of businesses requiring employees and job applicants to submit to drug testing has grown exponentially," H.R. Rep. 100-527, 100th Cong. 2d Sess. at 7 (1988), a large number of laboratories have sprung up overnight, as testing has grown into a $1 billion industry, "Testing For Drug Use," *Business Week* March 28, 1988 p. 65. The professionalism of many of these laboratories is in legitimate doubt. As Richard L. Hanks, chief of research technology at the National Institute of Drug Abuse has stated, "It's very easy to set up a poor lab, but not so easy to set up a good one." *Id.* Indeed, a study performed by the Center for Disease Control revealed that some of these laboratories have an error rate of 100%. Hansen, *et al., Crisis in Drug Testing*, 253 J. A.M.A. 2382 (1985).

The choice of a laboratory is thus critical to the reliability of a drug testing program; for that reason, the Alcohol, Drug Abuse and Mental Health Administration recently announced plans to certify laboratories to assure that laboratories used by the federal government meet "precise requirements for quality assurance" and are staffed by personnel who satisfy "specific educational and experience requirements . . . to ensure their competence and credibility." 53 Fed. Reg. 11970.

Whatever the quality of the laboratory, a drug testing program can only be as reliable as the type of test the employer chooses to purchase. The least expensive method of urinalysis testing—and hence the method to which employers often turn—is the EMIT test. H.R. Rep. 100-527, *supra*, at 11. But as the court below noted, "EMIT yields a significant rate of positive results even in the absence of drug use." 816 F.2d at 174. Indeed, the manufacturer of the EMIT test has advised its customers that the results of the test should *not* be relied upon, absent confirmation, as establishing the presence of an unlawful drug. Sonnestuhal et al., *Employee Assistance and Drug Testing*, 11 Nova L. Rev. 709, 720 (1987).

The "most conclusive technique presently available for identifying drugs or metabolites in biological specimens" is "mass spectrometry when combined with a suitable form of chromatography (e.g. gas chromatography . . .)." Dubowski, *Drug Use Testing: Scientific Perspectives*, 11 Nova. L. Rev. 415, 479 (1987). This technique—commonly abbreviated as GC/MS—is the one used by the Customs Service in the program at issue in the instant case and the one that all HHS-certified laboratories will be required to use, *see* 53 Fed. Reg. 11983.

On that assumption, a drug test can "discover the presence of . . . residues of drugs"—the inert metabolites—"existing after the actual active agent of the drug has been processed by the body." Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L. Rev. 605, 632 (1987). The presence of the metabolite in the tested individual's urine ordinarily signifies that the individual ingested the drug in question during a finite period prior to the test, although even this much is not entirely certain because the marijuana metabolite can be found in the urine of persons who were present where marijuana was being smoked, and because the metabolite of some other drugs (such as morphine) will be found in the urine of individuals who consumed lawful sustances (such as cough syrup). Dubowski, *supra*, 11 Nova L. Rev. at 509-11. More importantly, these inert metabolites "often remain in the body for days or even weeks after the ingestion of the drug," *id.*, and their presence in urine—which is, of course, a waste product—"do not prove that impairing chemicals are still circulating in the blood stream," Sonnesthul, *supra*, 11 Nova. L. Rev. at 721. To the contrary, "blood levels dissipate within a matter of hours rather than days or weeks," Denenberg & Denenberg, *Drug Testing From the Arbitrator's Perspective*, 11 Nova. L. Rev. 371, 402 (1987). In other words, "*[t]he usual effects of most drugs persist for a few minutes to a few hours after use*," McBay, *Efficient Drug Testing: Addressing the Basic Issues*, 11 Nova. L. Rev. 647, 649 (1987) (emphasis added).

Thus, as the National Institute of Drug Abuse has acknowledged, a positive test result "*cannot be used to*

prove intoxication or impaired performance" as of the time of the test. NIDA, *Employee Drug Screening: Detection of Drug Use By Urinalysis* (1986) (emphasis added).

2. In the run of drug testing cases, two principal arguments have been advanced to support the government's need, as employer, for the information that a drug test does provide. We treat these arguments *seriatim*.

(a) In most cases in which compulsory drug testing of public employees has been challenged, the principal justification that has been advanced has been the need to identify employees whose capacity to perform their jobs is impaired. But given the technological constraints on drug testing just reviewed, drug testing is a tool of the most dubious utility for identifying such individuals.

To begin with, because drug testing does not produce contemporaneous results—reliable testing requires that the urine specimen be sent to a laboratory for analysis, n. 6, pp. 15-16 *supra*—such testing cannot generate information which an employer can use to assess an employee's present capacity to do particular work; rather the most that drug testing can do, at least in theory, is to provide after-the-fact information about the tested employee's condition as of the date of the test. But the reality is that drug testing cannot do even that; as we have seen, all that drug testing can possibly tell an employer after-the-fact is whether a tested employee had ingested (or otherwise been exposed to) an illegal drug —most often marijuana—within a defined period of time prior to the test. P. 17 *supra*.[7]

[7] Of the illegal drugs in use in this country, marijuana is by far the most prevalent; for example, the 1985 National Household Survey on Drug Abuse conducted by the National Institute on Drug Abuse found that of those who had used a controlled substance during the prior thirty days, over 60% (18.2 million Americans) used marijuana; the next most frequently used drug was cocaine which was used by under 20% of the drug users (5.8 million Americans). Similarly, a survey of 5,000 civilian employees of

Given that fact—and given that drugs, like alcohol, have an active effect for only a matter of hours—a single positive test result is precisely analogous to a positive result on a test designed to ascertain whether an employee drank several glasses of wine (or another alcoholic beverage) during the preceding twenty-four or forty-eight hours. Such a result does identify individuals who may *possibly* report to work impaired by a drug (or by alcohol). The positive result does *not*, however, provide a reliable basis for concluding that the employee was impaired as of the time of the test, has ever been impaired while at work, or for identifying individuals who are likely to report to work in an impaired state in the future. Indeed, whenever employees are selected for testing without individualized suspicion, the fair inference is that the employer has no basis grounded in the employees' job performance for believing that the individuals being tested have reported to work under the influence of drugs.

Nor is it necessarily true that individuals who, on a single drug test, are found to have the marijuana (or some other drug) metabolite in their urine are more likely to be impaired while working than those not found to have the metabolite in their urine. All that can be said with assurance about those who test negative on a single test is that they had not used marijuana (or some other illegal substance) during some period prior to the test; such results say little if anything of substance as to whether those individuals used marijuana at other times, have ever reported to work, impaired, or are likely to do so in the future. Indeed, there is little reason to believe that those who test negative on a single occasion are less

the Department of Defense found that 6% used marijuana during the preceding year, but only 2% used cocaine and only 1% used any other drug. It is not surprising, then, that the record in this case indicates that of the 5% whose urine tests positive for drugs, "most" will be for the "marijuana metabolite." Affidavit of Dr. John P. Morgan, October 16, 1986 ¶ 6, J.A. 61.

frequent drug users than those who test positive on a single occasion.[8]

Drug use, moreover, is only one of many possible causes of impaired job performance; an employee's abiltiy to do her work is at least as likely to be affected by any of a variety of physical illnesses and limitations and by any of numerous psychological or emotional factors as by illegal drug abuse. Testing for drug traces in the urine cannot begin to identify individuals who are impaired due to any of these other causes; indeed "drug testing" cannot even identify users of the "drug most abused" in this country: alcohol. McBay, *supra*, 11 Nova. L. Rev. at 651. Yet so far as we are aware public employers who test for drugs do not use any means to test for these other possible causes of impairment. For this reason, too, drug testing is unlikely to appreciably advance the government's interest in an unimpaired workforce.

Finally, in determining the extent to which drug testing is necessary to further that governmental interest it is instructive to consider the availability of other means for ascertaining whether an employee has reported, or is likely to report, to work in an impaired state. As several district courts have found based on the evidence presented to them, supervisors can be trained in the "observation of behavioral changes at the workplace" which signify that an employee is either an "abuser[] of drugs or otherwise impaired on the job." *Taylor v. O'Grady*, *supra*, 669 F. Supp. at 1432. In addition, employers can use "neurobehavioral testing"—*viz.*, a battery of tests including a "finger tapping test," a "digit symbol" test, a color test, and a memory test—which "detect whether a worker's

[8] Of course, if the employer were to administer multiple tests to an employee and the test results were consistently negative (or positive) one could fairly conclude that the employee never (or recurrently) uses an illegal drug To our knowledge, however, no drug testing program currently being used involves such recurring test of the same individuals.

thinking and behavioral process [a]re impaired." *Id.* at 1433; *see* Baker et al, *Computer-Administered Neurobehavioral Evaluation System for Occupational and Environmental Epidemiology*, 27 J. Occup. Med. 206 (1985). As District Judge Hogan of the United States District Court for the District of Columbia recently found in *Federal Emp'oyees v. Carlucci*, *supra*, 2 Ind. Emp. Cases at 1273, "Both trained supervision and neurobehavioral testing can usually detect those who are imparied at work because of drug use, something urinanalysis drug testing cannot do."

(b) In a number of cases, including the instant case, *see* Br. in Opp. at 11, a quite different governmental interest has been advanced to support a drug testing requirement: a governmental interest in assuring employee integrity. As the Solicitor General recently put it in his petition for certiorari in *RLEA v. Burnley*, *supra* (at 19-20), "the primary governmental interest [in these cases] relates to the danger that those who *use* illicit drugs, whether or not they are impaired on the job, may be susceptible to corruption or blackmail," (emphasis in original).

At the threshold it is important to note that, so far as we are aware, there is no evidence whatsoever that drug-related corruption or blackmail of public employees is, in fact, a significant problem. Rather, this entire argument rests on speculation as to a problem that might arise. Furthermore, if the true purpose of a particular drug testing program were to prevent "corruption or blackmail," the test should be administered to all employees of the agency in question—from the agency head on down—yet in every drug testing program of which we are aware, *it is only the rank-and-file employees*, and not supervisors or top managers, who are tested.

In any event, insofar as a public employer is seeking to identify employees who are susceptible to bribery, drug testing—even if administered to all employees—once again is an ineffective means of identification. A single

positive drug test, to repeat, at most establishes nothing more than that the employee has on at least one occasion used a particular drug such as marijuana; the positive test result provides no basis for inferring that the individual has an expensive "drug habit," much less than the individual is prone to accepting a bribe to fund such a habit.

Conversely, the fact that on one occasion an individual tests negative for drugs says nothing about that individuals' susceptibility to bribery; even repeated negative test results would, at most, establish only that the individual does not need bribe money for the purpose of feeding a drug habit. There are a host of other reasons that might drive a public employee to accept a bribe ranging from a family medical crisis requiring expensive treatment to simple overspending resulting in heavy debts; drug testing quite obviously cannot identify individuals facing such financial pressures.

Drug testing is an equally poor method of identifying employees who are susceptible to blackmail. Any public employee who has failed to live an exemplary life—who has, *e.g.*, cheated on his taxes or been unfaithful to his or her spouse—is, of course, a potential target for blackmail; thus this concern could be invoked to justify searches of every public employee for every type of wrongdoing. Moreover, drug testing can identify only a small slice of the individuals who are potentially susceptible to blackmail: *viz.*, those employees who have used an illegal drug. And in a society in which the use of certain illegal drugs is so prevalent—as the Solicitor General notes studies show that among persons 18-25 years old, 65% have used illegal drugs, Br. in Opp. at 3 n.2, and even Supreme Court nominees and Presidential candidates have acknowledged drug use—it seems especially unlikely that an employee would violate his public duty in order to conceal the fact of, *e.g.*, occasional use of marijuana.

(c) In sum, the governmental interests that are proffered to justify drug testing of public employees are admittedly substantial. But those interests require only that chronic drug *abusers* rather than the occasional user of marijuana (or other drugs) be identified; it is only the abusers who are likely to use drugs in a way that endangers their work performance, or who are likely to be susceptible to bribes to support, or blackmail to hide, their drug habit. And such individuals can be directly identified through other techniques which are at once less intrusive and more precise. Thus, this is *not* a situation in which the choice is between an inexact and burdensome test on the one hand and impotence in the face of a serious work-place problem on the other.

The fact that, in the face of these alternatives, public employers are turning to drug testing (which cannot identify impairment or drug abuse) instead of, *e.g.*, neurobehavioral testing (which can) suggests that the governments' true concern is *not* to further their interest, as employers, in the efficient operation of the workplace but rather that the governments' employer status is being used as a *convenient situs* to further the governments' interest, *as law enforcer*, in punishing those who smoke marijuana or use other illegal drugs. Attorney General Edwin Meese in fact advocates a vast expansion of employment-based drug testing in part because of the deterrent effect of employment sanctions in "preventing people from disobeying the law." [9]

The short of the matter is this: given what drug testing can—and, more importantly, cannot—discover about the tested individual, the government's interest as employer in the operation of the workplace provides only the most limited support for a drug testing program involving workers not suspected of being under the influence of (or abusers of) illegal drugs.

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[9] "Meese Asks Drug Tests for 'Most' Workers," *Washington Post*, April 27, 1988, p. 1.

D. The Government's Suggested Analogies

Before drawing the ultimate lessons from the foregoing analysis of the factors relevant to striking the Fourth Amendment balance here, we pause to consider two supposed analogies to drug testing put forward by the Solicitor General.

1. The Solicitor General first attempts to equate compulsory drug testing with compulsory physical examinations, contending that the former can be no more constitutionally suspect than the latter. For purposes of analysis we can assume that a public employer may, without running afoul of the Fourth Amendment, require his employees to undergo periodic physical examinations by a physician of the employer's choosing, and that in such physicals employees may be required to expose even more of their anatomy than is exposed in the process of providing a urine specimen, and to reveal even deeper personal, physiological secrets than are revealed by urinalysis. But even assuming all that to be true, it does not follow that required drug testing stands on an equal constitutional footing with required periodic physical examinations.

The Government's argument ignores the fact that, as *O'Connor v. Ortega*, *supra* reaffirms, "what is reasonable depends on the *context* within which a search takes place." 55 L.W. at 4408 (emphasis added). It is plain that permitting an employer to require an employee to expose his or her anatomy *to a physician* during a medical examination does *not* establish the reasonableness of requiring even the same (or a lesser) type of exposure in *other* settings. That is shown by the simple example of a rule compelling an employee to disrobe at the workplace not at the direction of a physician conducting a medical examination but on the command of the employee's supervisor conducting a random search for missing government property. The unconstitutionality of such a rule is self-evident.

The Solicitor General's attempt to equate an employer-mandated drug testing program with an employer-mandated requirement that employees undergo periodic physical examinations similarly ignores vital distinctions between the two contexts. Physical examinations—including employment physicals—are conducted by medical personnel in a medical environment. A periodic examination of an incumbent employee thus does not have an adversarial flavor to it: the purpose of such an examination has nothing to do with ascertaining whether the employee has engaged in wrongful conduct. Rather, the purpose of a periodic physical is "to discover a disease process in an early asymptomatic period when the disease is reversible or treatable" and "to detect health conditions potentially related to work which . . . might be treatable in the public health sense, that is, by the recognition and control of [workplace] hazards." Goldman, *General Occupational Health History and Examination*, 28 J. Occup. Med. 967 (1986). Indicative of this is the fact that employees generally are free to schedule periodic physicals, in advance, at a time that is convenient to the employee, and employees are not policed while they provide information or specimens to the doctor.

Most important of all, under the *Code of Ethical Conduct for Physicians Providing Occupational Medical Service*, promulgated by the American Occupational Medical Association and the American Academy of Occupational Medicine in 1976, physicians conducting employment-related physicals are enjoined to

> *treat as confidential* whatever is learned about individuals served, releasing information only when required by law or by over-riding public health considerations, or to other physicians at the request of the individual according to traditional medical ethical practice.

The only information to be provided to employers is "counsel about the medical fitness of individuals in rela-

tion to work"; employers are "*not* entitled to diagnoses or details of a specific nature."

It follows that at least those drug tests which are not administered as part of a *bona fide* physical examination —*viz.*, drug tests which are not administered in the medical context, for medical reasons, and are not subject to the constraints of the medical profession with respect to disclosing the test results—are fundamentally different from physical examinations.

2. The Solicitor General alternatively seeks to save drug testing programs by reliance on the administrative search cases. But as this Court has stated those cases are "'relatively unique,'" *Delaware v. Prouse*, *supra*, 440 U.S. at 662, and do not help the Solicitor General here.

To begin with, in most of the administrative search cases the "victim" of the search had a greatly reduced expectation of privacy. Almost all of those cases involved searches of commercial property and, as the Court observed last Term, "[a]n expectation of privacy in commercial premises . . . is different from, and indeed less than a similar expectation in an individual's home." *New York v. Burger*, —— U.S. ——, 55 L.W. 4890, 4893 (June 19, 1987).[10] Furthermore, in those administrative search cases in which the Court has permitted warrantless searches, the Court has found "such a history of government oversight that no reasonable expectation of privacy could exist for the proprietor over the stock of such an enterprise." *Marshall v. Barlow's Inc.*, *supra*, 435 U.S. at 313, *discussing Colonnade Corp. v. United States*, 397 U.S. 72 (1970) *and United States v. Biswell*, 406 U.S. 311 (1972).[11] And in the cases in

[10] *See also G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) ("The Court . . . has recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context").

[11] *See also Donovan v. Dewey*, 452 U.S. 594, 600 (1981) ("the federal regulatory presence is sufficiently comprehensive and defined

which the Court has upheld checkpoint stops of automobiles, the Court has stressed that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

Second, in many of these cases the search itself involved a minimal intrusion on such privacy interests as existed. The Court made this point in *Camara v. Municipal Court*, *supra*, the seminal administrative-search case: "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizens' privacy." 387 U.S. at 537. A similar understanding underlies the automobile checkpoint stop cases; indeed in *United States v. Ortiz*, *supra*, 422 U.S. at 894, the Court *refused* to allow checkpoint searches—as opposed to checkpoint stops—because of "the invasion of privacy that a search entails."

Third and finally, in all of the cases permitting searches without individualized suspicion, the Court has been satisfied that "the need for this enforcement technique [wa]s demonstrated by the record." *Id.* at 561. The Court has permitted searches without individualized suspicion only when it is "doubtful that any other canvassing technique would achieve acceptable results." *Camara v. Municipal Court*, *supra*, 387 U.S. at 537. And the Court has dispensed with the warrant requirement only when persuaded that doing so is necessary "if the law is to be properly enforced and inspection made effective." *United States v. Biswell*, *supra*, 406 U.S. at 316.

As we have seen, none of this is true with respect to government-mandated drug testing programs. Employees come to work with the entirely reasonable expectation

that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes").

grounded in our most basic social mores that they will *not* be required to urinate on command, under supervision, and to submit their urine to chemical analysis in which personal, physiological secrets may be uncovered. Drug testing thus constitutes a significant intrusion on Fourth Amendment interests. And, in the main, "the need for this enforcement technique" has *not* and *cannot* be established. For these reasons, the administrative search cases provide no comfort to the Solicitor General here.

E. The Lessons

The foregoing analysis leads to the following conclusions.

1. In the run of cases in which incumbent employees are required by the government to provide a urine sample to the employer for chemical analysis, drug testing involves a substantial intrusion on the interests protected by the Fourth Amendment. Being required to submit to a drug test in and of itself represents a substantial physical and psychological intrusion; the fact that as the result of this intrusion the individual's personal, physiological secrets will be revealed makes the overall invasion of privacy that much greater. And the psychological effects are especially great when, instead of testing all employees in a particular job category, the testing is done of a randomly-selected subgroup. Thus, drug testing—and, particularly, random testing—simply cannot be viewed as " 'a relatively limited invasion' of employee privacy," *O'Connor v. Ortega*, 55 L.W. at 4410; rather, drug testing must be viewed as the equivalent of a full-fledged search.

Conversely, empowering the government to require an employee to submit to a drug test absent any reason to suspect drug use by the employee based upon, *e.g.*, the employee's demeanor, behavior, work performance and the like, will not "substantially promote[ ]," *Delaware v. Prouse*, *supra*, 440 U.S. at 660, the government's admittedly significant interest in the productive operation of the workplace. Unless the test is being used to confirm a suspicion that the employee is under the influence of an illegal drug, the only information that can be obtained from the test—that the individual used marijuana (or some other drug) within several days (or perhaps weeks) of being tested—does *not* provide reliable information of relevance to the government as employer. And the information that the government seeks to glean from drug testing can be ascertained through procedures that are at once more precise and less intrusive.

In light of the foregoing, absent unusual circumstances which lead either to a significant diminution of the privacy expectations that employees ordinarily bring to their workplace or, alternatively, which make the limited information that can be gained from drug testing of particular relevance to the public employer, the government should not be permitted to compel any employee to submit to drug tests absent a reasonable, particularized basis to suspect the employee of wrongdoing. Testing without such suspicion lacks the first requisite for a reasonable search: that the search be "justified at its inception." *O'Connor v. Ortega*, *supra*, 55 L.W. at 4410.

Fourth Amendment freedoms are simply too precious to permit so massive an invasion for so limited a gain. As the Court has stated:

> "These [Fourth Amendment] rights belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." [*Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 274, *quoting*, *Brinegar v. United States*, 338 U.S. 100, 180 (Jackson, J., dissenting)]

2. The constitutional flaw in drug testing programs runs far deeper. Even if drug testing did provide highly

valuable information to the government as employer, such searches still would run afoul of the Fourth Amendment. The Fourth Amendment was not needed—and was not adopted—in order to proscribe pointless searches or searches which are of only marginal utility to the government. Rather, the great aim of the Fourth Amendment is to protect personal privacy and dignity precisely in those situations in which the government does have a need, and even a pressing need, for the information being sought. As Justice Stewart put it in his opinion for the Court in *Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 273:

> The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Thus, we have no doubt that no matter how strong the governmental interest, qua employer, in identifying drug users, the government would not be free to conduct general searches of the homes of its employees or of their persons and belongings as they came to work each day in order to seek out illegal drugs; "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all," *Arizona v. Hicks*, —— U.S. ——, 55 L.W. 4259, 4260 (March 3, 1987). Given the level of intrusion on Fourth Amendment interests effected by drug testing, the same principle should control, as a general rule, in this context as well.

CONCLUSION

For the reason stated by the petitioner and the additional reasons stated herein, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
Petitioners,

v.

WILLIAM VON RAAB, COMMISSIONER,
UNITED STATES CUSTOMS SERVICE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR THE FRATERNAL ORDER OF POLICE, GRAND LODGE, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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THE INTEREST OF AMICUS CURIAE

With the consent of the parties, the Fraternal Order of Police, Grand Lodge, respectfully submits this *amicus curiae* brief in support of petitioners. Letters of consent from counsel for petitioners and counsel for respondent have been filed with the Clerk.

The Fraternal Order of Police, Grand Lodge ("FOP"), is a national fraternal organization of state and subordinate lodges consisting of law enforcement officers of the United States and of the states and their political subdivisions. Comprised of more than 190,000 members, the FOP is the largest member organization of law enforcement officers in the United States or, to our knowledge, in the world. The FOP currently has 1,697 lodges in 43 states. The membership of each local lodge typically includes officers from several law enforcement jurisdictions.

The FOP has a vital interest in the issues presented in this case because law enforcement officers are frequent targets of drug testing programs. Indeed, many of the reported cases which will be cited to this Court have involved drug testing programs aimed at police or other law enforcement officers.[1] Although the present case does not

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[1] *See, e.g., Mack* v. *United States*, 814 F.2d 120 (2d Cir. 1987), *aff'g Mack* v. *United States*, 653 F. Supp. 70 (S.D.N.Y. 1986) (FBI agent); *Policemen's Benevolent Ass'n* v. *Washington Twp.*, 672 F. Supp. 779 (D.N.J. 1987) (township police officers); *Feliciano* v. *City of Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987) (police academy cadets); *Guiney* v. *Roache*, 654 F. Supp. 1287 (D. Mass. 1987) (Boston police officers); *American Federation of Government Employees* v. *Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986) (civilian police officers at Fort Stewart, Georgia); *Bostic* v. *McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986) (city police officer); *Penny* v. *Kennedy*, 648 F. Supp. 815 (E.D. Tenn. 1986) (Chattanooga police officers); *Capua* v. *City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (city fire fighters and police department employees); *Turner* v. *Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985) (District of Columbia police officers); *Fraternal Order of Police* v. *City of Newark*, 216 N.J. Super. 461, 524 A.2d 430 (1987) (members of Newark narcotics bureau); *Perez* v. *Ward*, 69 N.Y.2d 840, 507 N.E.2d 296 (1987)

necessarily present the full range of issues which lower courts have addressed in this area, this Court's decision will have a significant impact on the civil and constitutional rights of law enforcement officers.

The members of the Fraternal Order of Police have a valuable perspective on drug testing programs. As law enforcement officers engaged in the war against crime, they are rightfully required to perform their daily functions without violating the constitutional rights of the persons they investigate or arrest. Yet, as public employees, they often are expected to surrender their own constitutional rights and submit to drug testing in order to further the admittedly important goal of a drug-free workplace. FOP members justifiably believe that public servants should not be afforded fewer constitutional protections than criminal defendants.

At its 48th Biennial Conference held on August 9-15, 1987, the Grand Lodge, Fraternal Order of Police, adopted a resolution that "[a]ll drug and alcohol testing policies must conform to the Fourth Amendment rights regarding unreasonable searches and seizures, including a reasonable suspicion requirement for case-by-case testing of sworn officers."[2] Because the court of appeals held that the Customs Service could test its employees without *any* suspicion that they had been using illegal drugs, the FOP respectfully submits this brief in support of petitioners.[3]

(police and correction officers); *Caruso* v. *Ward*, 506 N.Y.S.2d 789 (Sup. Ct. 1986) (New York City organized crime bureau). Moreover, many of the Customs Service employees subject to the drug-testing program involved in this case would be considered law enforcement officers.

[2] The full text of this resolution is set forth in the Appendix.

[3] Because the parties undoubtedly will discuss the facts of this case in careful detail, the FOP, as *amicus curiae*, has not prepared a Statement of Facts. Although the facts of this case will be referenced throughout the argument, the interest of *amicus* extends to the broader implications of government drug testing programs in general. The reliability of drug testing procedures is a matter of great concern which we expect will be addressed by the parties and other *amicus curiae*. This brief will concentrate on analyzing the Fourth Amendment issues presented by this and other drug testing programs for public employees.

SUMMARY OF ARGUMENT

Although this Court has not previously addressed the issues raised by government drug testing programs, it held long ago that the taking and testing of a blood sample was governed by the Fourth Amendment. *Schmerber* v. *California*, 384 U.S. 757 (1966). Drug testing by urinalysis likewise constitutes a significant intrusion upon personal privacy and dignity. Members of our society have a legitimate expectation of privacy in the process of urination and in the physiological information which can be derived by testing urine, and this reasonable expectation of privacy is not surrendered, nor should it be sacrificed, when one becomes a public employee. The state and federal courts which have addressed this issue are nearly unanimous in holding that compulsory urine testing by the government constitutes a search. The FOP, as *amicus curiae*, urges this Court to hold that government programs of drug testing by urinalysis are governed by the Fourth Amendment.

Determining what Fourth Amendment standards restrict such searches is more complex, but many of this Court's prior decisions would compel the conclusion that drug testing by urinalysis must be authorized by a warrant issued upon probable cause. This Court long has recognized that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978) (quotations omitted).

None of the recognized exceptions to the warrant requirement applies to the circumstances of this case. Because employees are given advance notice of the drug test, and because the Customs Service is testing for evidence of past drug use, not present impairment, it cannot realistically be said that there is no time to obtain a warrant. The exception for administrative searches of closely regulated industries heretofore has been narrowly limited and it should not be extended to searches of persons. More-

over, it is a fiction to suggest that petitioners have voluntarily consented to the testing program. If such searches are appropriately based upon individualized suspicion, instead of being required of all employees or conducted on a random basis, legitimate searches should be few in number and it would not be impractical or overly burdensome to obtain a warrant.

Nevertheless, the lower courts have not required that warrants be issued. Instead, they generally have employed a balancing test to determine whether specific drug screening programs are reasonable. Most courts have determined that the Fourth Amendment requires drug testing by urinalysis to be based upon reasonable, individualized suspicion. Respondent would urge this Court to go even further and allow such tests to be conducted without a warrant, without probable cause, and without any reasonable, individualized suspicion.

The FOP does not deny that the government has a legitimate interest in discouraging the use of illegal drugs by its employees. This interest is particularly significant where law enforcement officers are concerned. As is so often the case when individual liberties are involved, the disagreement is about means, not ends. The constitutional rights of individual employees should not be sacrificed to serve admittedly important interests of the government. Rather, the government should advance its interests by more appropriate means.

Allowing urine tests to be conducted without a warrant would be a major concession to governmental interests. It would be a further, significant concession to permit warrantless searches based upon anything less than probable cause. If the importance of these time-honored Fourth Amendment protections is outweighed in this context by the needs of the government acting as employer, this Court should at a minimum require that such searches be based upon reasonable, individualized suspicion.

ARGUMENT

I. Drug Screening By Urinalysis Is a Fourth Amendment Search

Reacting to the widespread problem with drugs that our country is experiencing, an increasing number of public and private employers have sought to implement mandatory drug testing programs for their employees. Although many significant questions are raised by such programs, drug testing by private employers normally does not present any Fourth Amendment issues. However, the Fourth Amendment does restrain governmental action, and therefore applies to the activities of public employers. *See O'Connor* v. *Ortega*, ___ U.S. ___ , 107 S. Ct. 1492 (1987). If mandatory drug screening by urinalysis constitutes a search or seizure, a government testing program must satisfy the requirements of the Fourth Amendment. Although this Court has not yet decided whether such testing procedures intrude upon interests protected by that Amendment, its prior decisions leave no doubt that this is the case.

More than two decades ago this Court addressed the Fourth Amendment implications of extracting and testing body fluids, observing that the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber* v. *California*, 384 U.S. 757, 767 (1966). *Schmerber*, of course, involved the taking and testing of a blood sample to provide evidence of alcohol intoxication, procedures which this Court held to be governed by the Fourth Amendment: "Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment." *Ibid.* Several years later this Court similarly held that collecting scrapings from beneath a suspect's fingernails constituted a search that was subject to constitutional scrutiny. *Cupp* v. *Murphy*, 412 U.S. 291, 295 (1973). The threshold issue in this case is whether there is any legitimate basis for holding that the compulsory collection and

testing of urine samples is not governed by Fourth Amendment safeguards. Even the court below, which approved the testing program at issue, recognized that drug screening by urinalysis "constitutes a search under the fourth amendment." *National Treasury Employees Union* v. *Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987) (Pet. App. 8a).

Application of the Fourth Amendment depends on whether the person invoking its protection can claim a legitimate expectation of privacy that has been invaded by government action. *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979). This inquiry normally embraces two discrete questions: (1) whether the individual has an actual (subjective) expectation of privacy, and (2) whether that expectation of privacy is one that society is prepared to recognize as "reasonable." *Id.* at 740, citing *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *See also United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984) ("an expectation of privacy that society is prepared to consider reasonable"). Among those courts which have considered the issue of drug testing by urinalysis, there has developed an impressive consensus that such procedures invade legitimate expectations of privacy. Even courts which have upheld programs of mandatory urinalysis without reasonable suspicion have acknowledged that the process constitutes a search and/or seizure under the Fourth Amendment.[4]

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[4] *See, e.g., Jones* v. *McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (drug testing as part of a routine, reasonably required, employment-related medical examination); *National Treasury Employees Union* v. *Von Raab*, 816 F.2d 170 (5th Cir. 1987); *McDonell* v. *Hunter*, 809 F.2d 1302 (8th Cir. 1987) (holding that some urinalyses may be performed uniformly or by systematic random selection); *Shoemaker* v. *Handel*, 795 F.2d 1136 (3rd Cir.) (tests assumed to be a search or seizure; highly regulated industry exception applied), *cert. denied*, 107 S.Ct. 577 (1986); *American Federation of Government Employees* v. *Dole*, 670 F. Supp. 445 (D.D.C. 1987) (upholding random urine testing program). *But compare Division 241 Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264 (7th Cir.) (bus operators in serious accidents had no reasonable expectation of privacy), *cert. denied*, 429 U.S. 1029 (1976); *Mack* v. *United States*, 814 F.2d at 125 n.2 (seeming to suggest that taking of urine sample might not be a search).

There can be no doubt that individual citizens (including government employees) have actual expectations of privacy in the process of urination as well as in the physiological information which urine contains. As the court of appeals recognized in this case:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom. While individuals may choose not to urinate in private but instead to use public toilet facilities, they make this choice themselves . . . [E]ven the individual who willingly urinates in the presence of another does not " 'reasonably expect to discharge urine under circumstances making . . . discover[y of] the personal physiological secrets it holds' " possible.

National Treasury Employees Union v. *Von Raab*, 816 F.2d at 175 (Pet. App. 8a), quoting from *Capua* v. *City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986) and *McDonell* v. *Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987). Individuals certainly do not expect that a government official will be watching as they urinate, but this is a common requirement of drug testing programs.

"It is unrealistic to argue . . . that a person has no reasonable expectation of privacy with respect to urine because it is a waste product periodically eliminated from the body. Although it is a waste product, it is not generally eliminated in public or in such a way that the public or government officials can gain access to it in order to 'read' its contents. . . . [Moreover,] it does not follow . . . that a person has no privacy interests in a waste product before it is abandoned and therefore no right to dispose of it in a way which maintains privacy." *Patchogue-Medford Teachers Congress* v. *Board of Education*, 70 N.Y. 2d 57, 67,

510 N.E. 2d 325, 329 (1987). *Accord*, *Feliciano* v. *City of Cleveland*, 661 F. Supp. 578, 586 (N.D. Ohio 1987). *But compare Turner* v. *Fraternal Order of Police*, 500 A.2d 1005, 1011 (D.C. 1985) (Nebeker, J., concurring) ("An individual cannot retain a privacy interest in a waste product that, once released, is flushed down the drain"). Although individuals, especially employees, are often obliged to use common toilet facilities, a person who urinates in such a facility, thereafter flushing his urine down a drain, has not manifested such a lack of expectation of privacy that he could necessarily be expected to agree to preserve that waste in a specimen bottle and surrender it to government authorities.

The process of urination is intensely personal, but it is also an activity performed by each and every member of society. In this sense, individual expectations of privacy are shared in common. It therefore seems clear that this subjective expectation of privacy is one that society is prepared to consider "reasonable." As the D. C. Circuit has recently observed, "[m]andatory urinalysis clearly implicates rights secured under the Fourth Amendment. This court and virtually all others that have ruled upon the constitutionality of compulsory urinalysis have held or assumed that it amounts to a 'search' or 'seizure' within the meaning of the Fourth Amendment." *Berry* v. *District of Columbia*, 833 F.2d 1031, 1034 (D.C. Cir. 1987) (citations omitted). *Accord*, *Jones* v. *McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987).

A contrary ruling by this Court would have serious ramifications. Lending a useful perspective to the question, the court of appeals considered the consequences of holding that the Fourth Amendment was not implicated: " '[i]f an activity is not a search or seizure . . . the government enjoys a virtual carte blanche to do as it pleases.' " 816 F.2d at 176 (Pet. App. 9a), quoting from *Horton* v. *Goose Creek Independent School District*, 690 F.2d 470, 476 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983). The activity would be excluded "from judicial control and from the command of reasonableness." Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 393 (1974).

Because employer-mandated urine testing programs present the threat, indeed the immediate reality, of massive intrusions upon "personal privacy and dignity," we urge this Court to hold that compulsory urine testing by the government constitutes a search for purposes of the Fourth Amendment.

II. The Employment Relationship Does Not Deprive a Government Employee of His Fourth Amendment Rights

A person's reasonable expectations of privacy are not destroyed by the fact that she chooses to become a public employee. If anything, a citizen should be entitled to expect that the government will be more diligent than other employers in respecting individual rights and liberties. In *O'Connor* v. *Ortega* this Court unanimously recognized that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." 107 S. Ct. at 1498 (plurality opinion). *See also id.* at 1505 (Scalia, J., concurring); *id.* at 1508 (Blackmun, J., dissenting). Police officers, in particular, "are not relegated to a watered-down version of constitutional rights." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967). On the other hand, each member of the *O'Connor* Court seemed to recognize that the employment relationship, or the "operational realities of the workplace," could affect the Fourth Amendment analysis.[5] In the context of mandatory

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[5] This conclusion was expressed in different ways. The plurality stated that the employment context could affect the analysis of whether the Fourth Amendment applied at all: "[g]iven the great variety of work environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." 107 S. Ct. at 1498. Justice Scalia reasoned that "the government's status as employer, and the employment-related character of the search," was relevant to whether the governmental intrusion was reasonable. *Id.* at 1506. The dissenters acknowledged that, "in certain situations, the 'operational realities' of the workplace may remove some expectation of privacy on the part of the employee." *Id.* at 1508.

drug testing by urinalysis, however, the employment relationship should not affect the conclusion that each citizen has a reasonable expectation of privacy protected by the Fourth Amendment. If one's status as a public employee affects the analysis at all, it should be in determining the reasonableness of governmental intrusions upon that protected interest. *Compare O'Connor*, 107 S. Ct. at 1505 (Scalia, J., concurring).

The employment context should not alter the conclusion that a person has a reasonable expectation of privacy in the act of urination as well as in the physiological information which urine contains. The "operational realities of the workplace" impact upon one's privacy in his surroundings, not upon physiological privacy. At work one typically encounters many more individuals than at home and his duties may require him to interact with persons he would not otherwise choose as associates. An employee may be required to share an office or other workspace and may well expect that items on his desk will be scrutinized or that his conversations may be inadvertently or even purposely overheard by others close by.[6] He may also expect that his supervisors or co-workers will need access to his files or workpapers. Thus, an employee's expectations of "environmental privacy" may be substantially reduced.

Employment does not, and should not, have the same type of impact upon physiological privacy. An employee still has a degree of choice as to when he performs his bodily functions. Although he may find it necessary to use a common toilet facility, he typically will be able to enjoy a modicum of privacy. Moreover, the realities of interacting with supervisors and other employees do not affect the type of privacy addressed here. These "operational realities" do not, in and of themselves, require the employee to surrender his expectations of privacy in the act of urination and in the information which may be discovered by testing urine.

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[6] Telephone calls into and out of police stations frequently are monitored and the conversations often are recorded.

It would be tautological to suggest that an employee's reasonable expectations of privacy are eliminated if regulations announced by an employer cause him to expect that his urine will be tested. This proposition was vividly illustrated by the Court in *Smith* v. *Maryland*:

> [I]f the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. . . . In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.

442 U.S. at 740-741 n.5. Expectations of privacy must be judged without reference to the fact that employer-mandated drug testing programs are becoming widespread, and the existence of the employment relationship should not affect the conclusion that drug testing of public employees triggers Fourth Amendment protection.

III. What Fourth Amendment Protections Are Required?

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Although this Amendment is one of the most frequently litigated portions of our Constitution, the relationship between the clause prohibiting unreasonable searches and seizures and the clause regulating the issuance of warrants continues to be the subject of intense debate. The recent

opinions of this Court exhibit considerable tension between the view that warrantless searches are *per se* unreasonable, subject only to a few well-established exceptions, and the view that the primary focus must be the reasonableness of the search, with the presence or absence of a warrant being one important factor for consideration.

In *Mincey* v. *Arizona*, 437 U.S. 385 (1978), this Court unanimously declared that the "Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " 437 U.S. at 390 (citations omitted). This principle represents this Court's "longstanding understanding of the relationship between the two Clauses of the Fourth Amendment," and the Court has "consistently reaffirmed [its] understanding that in all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the 'persons, houses, papers, and effects' of citizens." *Thompson* v. *Louisiana*, 469 U.S. 17, 20 (1984) (*per curiam*).

Notwithstanding this time-honored method of analyzing Fourth Amendment issues, most of the lower courts which have considered challenges to compulsory urinalysis programs have devoted little or no discussion to the need for a warrant. Such an approach "omits a crucial step" in the Fourth Amendment analysis. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). Engaging in this analytical step reveals that drug testing programs typically do not fit within any recognized exception to the warrant requirement. Moreover, a conclusion that a warrant is not required does not eliminate the need for a demonstration of probable cause.

When this Court first addressed the Fourth Amendment issues involved in the testing of body fluids, it recognized that "[s]earch warrants are ordinarily required for searches

of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." *Schmerber* v. *California*, 384 U.S. at 770. A warrant was excused in *Schmerber*, however, because "there was no time to seek out a magistrate and secure a warrant." *Id.* at 771. The officer was testing for evidence of present, or recent, intoxication, and this Court recognized that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops . . . ." *Id.* at 770. Thus, although the officer had probable cause to conduct the search, the need for a warrant was excused because of "exigent circumstances," a well-recognized exception to the warrant requirement. The Court also concluded that "the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." *Id.* at 771.

Even when much lesser intrusions on the body have been involved, this Court has proceeded from the presumption that a warrant and probable cause are required. Although the taking of scrapings from underneath fingernails was upheld in *Cupp* v. *Murphy*, *supra*, despite the absence of a warrant, this Court emphasized the "highly evanescent" nature of the evidence, 412 U.S. at 296, and analogized the procedure to the well-recognized "exception to the warrant requirement when a search is incident to a valid arrest." *Id.* at 295. In upholding the search, this Court considered "the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence. . . ." *Id.* at 296.

Unlike the petitioner in *Schmerber*, public employees being subjected to compulsory urinalysis are not under arrest, nor, by contrast to the situation in *Cupp* v. *Murphy*, is there probable cause to make an arrest. Consequently, the exception for searches incident to arrest may not be used as either a complete or partial justification for dispensing with the requirement of a warrant.

Other justifications for allowing such tests without a warrant will depend on the purpose and circumstances of

the urinalysis. In the case presently before the Court, the Customs Service is not testing for current intoxication or impairment. Indeed, the EMIT test is not capable of measuring impairment. (Petition for a Writ of Certiorari at 3). Moreover, the tests are announced five days in advance. Consequently, the government is not searching for "highly evanescent evidence" and it cannot realistically be said that there is no time to seek a warrant. Thus a warrant is not excused on the grounds of exigent circumstances.[7] Yet, "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. at 393-394.

The presumption in favor of a warrant is not based merely on formalistic obedience to the text of the Constitution. To the contrary, the warrant process serves important interests protected by the Fourth Amendment. The warrant itself provides evidence of proper authorization, and its particularized description of the scope and objects of the search limits both the intrusion and the discretion of the searching official. The process of obtaining a warrant requires the official to articulate, in a manner not colored by hindsight, his basis for conducting the search. The process of review by a neutral magistrate also serves as a check on discretion and, frankly, the inconvenience involved in obtaining a warrant may discourage officials from conducting unnecessary searches. *See generally, Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 565 (1976); *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967).[8]

[7] In *Railway Labor Executives' Ass'n* v. *Burnley*, 839 F.2d 575 (9th Cir. 1988), the Ninth Circuit concluded that "the exigencies of testing for the presence of alcohol and drugs in the blood, urine or breath require prompt action which precludes obtaining a warrant." *Id.* at 583. In that case, however, the employees were being tested for evidence of impairment by alcohol or drugs, and breath and blood tests were used in addition to urinalysis. Thus, the need for prompt action was far different than it is in the present case. Moreover, the plaintiffs in *Burnley* had conceded that a warrant was not necessary. *Ibid.*

There is, however, substantial question whether a federal judge or magistrate currently would have authority to issue a warrant for the urine testing of a federal employee. Rule 41 of the Federal Rules of Criminal Procedure provides that a warrant may be issued to search for and seize any:

> (1) property that constitutes evidence of the commission of a *criminal offense*; or (2) contraband, the fruits of *crime*, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a *criminal offense*; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

Fed. R. Crim. P. 41(b) (emphasis added). The use of illegal drugs is not a federal criminal offense, so this rule would

[8] Should it be concluded that a warrant is not required for drug testing of employees by urinalysis, many of these same interests should be addressed by the regulations which authorize the search. As we argue below, any directive to submit a urine sample must be based, at a minimum, on reasonable, individualized, suspicion. This requirement serves to limit the discretion of testing officials. Moreover, that reasonable suspicion should be articulated (and recorded in some fashion) before the search takes place, thus better preserving the rights of the employee and preventing the distortion of justifications by hindsight. In upholding a category of urinalysis testing based on reasonable suspicion, the Eighth Circuit directed that "the specific, objective facts . . . be disclosed to the employee at the time the demand [for a specimen] is made." *McDonell* v. *Hunter*, 809 F.2d at 1309.

In addition, law or regulation should prohibit the government from testing the urine to discover physiological information unrelated to illegal drug use (*e.g.*, pregnancy, illness, or the use of medication). In the context of urine testing, such prohibitions would limit the scope of the search, serving many of the same goals as the particularity requirement of the warrant clause.

not seem to authorize the issuance of warrants to determine whether an individual had used illegal drugs.[9]

Concern about whether the issuance of such a warrant is currently authorized should not deter this Court from holding that a warrant is constitutionally required. In *Marshall* v. *Barlow's, Inc.*, *supra*, the Court held that warrants were required for OSHA inspections although there was no explicit authority for their issuance. Subsequently, district courts were required to ponder whether they had authority to issue OSHA inspection warrants. *See, e.g., In re Inspection of Cleveland Electric Illuminating Co.*, 548 F. Supp. 224 (N.D. Ohio 1981); *Marshall* v. *Huffhines Steel Co.*, 478 F. Supp. 986 (N.D. Tex. 1979). If the issuance of warrants to conduct urine testing is not currently authorized, then the Executive Branch, which desires to implement widespread drug testing programs, may seek legislation providing such authorization.

On the other hand, this Court has "dispensed with the warrant requirement when the 'burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search'. . . ." *New Jersey v. T.L.O.*, 469 U.S. at 340, *quoting from Camara v. Municipal Court*, 387 U.S. at 533. In the present situation the time commitment involved in obtaining a warrant would not be unduly burdensome, and the persons administering drug tests should be, or could reasonably be expected to become, familiar with warrant procedures and concepts such as probable cause and reasonable suspicion. *Compare O'Connor v. Ortega*, 107 S. Ct. at 1500 (work supervisors would otherwise have no reason to be familiar with warrant procedures). Nevertheless, requiring a warrant would tend to transform an employment-related inquiry into an investigation with criminal over-

[9] Rule 41 is not the exclusive authority for the issuance of warrants, *see* Fed. R. Crim. P. 41(h), but alternative authority would have to be expressed or implied in an Act of Congress. *See, e.g.*, 18 U.S.C. §3103a; 21 U.S.C. §880(d) (authorizing the issuance of administrative inspection warrants for search of pharmacists' records, etc.); 29 U.S.C. §657(a) (OSHA inspections). We do not know of any law which authorizes the issuance of warrants for this purpose.

tones. An appreciation of the mechanics of obtaining a search warrant provides the most convincing basis for concluding that a warrant requirement would "frustrate the governmental purpose behind the search."

In the federal system, a search warrant must be requested by "a federal law enforcement officer or an attorney for the government." Fed. R. Crim. P. 41(a). Surely these overworked officials would be reluctant to become involved in routine drug testing of public employees. If they did become involved, there might be a natural inclination to exploit evidence of drug use to further investigations of drug distribution. This insertion into the workplace of procedures designed for criminal investigations might disrupt the employment relationship and frustrate the goal of rehabilitating employees who were found to be drug users. The experience would be especially demeaning for those employees who were found to be drug free.

In the specific factual circumstances presented in *O'Connor v. Ortega* this Court concluded that the warrant requirement was impractical in the workplace. The Court also might reasonably conclude that in the narrow context of drug testing of employees the warrant requirement is unsuited to the work environment. (Such a limited exception to the warrant requirement would not be appropriate when a search is motivated by a desire to gather evidence of crime.) Alternatively, the government might develop an administrative warrant procedure which did not require the involvement of federal law enforcement officials, attorneys for the government, or even the federal courts.

A conclusion that a warrant can be excused does not mean, however, that a search can be conducted based on anything less than probable cause. Although searches of automobiles fall within a well-recognized exception to the warrant requirement, they still must be supported by probable cause. *See United States* v. *Ross*, 456 U.S. 798, 809 (1982); *United States* v. *Ortiz*, 422 U.S. 891, 896 (1975). In the present circumstances as well, the quantum of sus-

picion necessary to validate a search is an important constitutional protection.[10]

IV. The Administrative Search Exception Should Not Be Extended to Searches of Persons

An exception to the warrant requirement which will be urged upon this Court is that applying to administrative searches of closely regulated industries. One often-cited decision has used this rationale to uphold warrantless breath and urine testing of employees. *Shoemaker* v. *Handel*, 795 F.2d at 1142. Nevertheless, it is incongruous and, frankly, offensive to use a rationale dealing with commercial premises such as stone quarries, *Donovan* v. *Dewey*, 452 U.S. 594 (1981), and junkyards, *New York* v. *Burger*, ___ U.S. ___ , 107 S. Ct. 2636 (1987), to justify a type of search which may reveal the most intimate details of personal health and private, off-duty conduct. An exception dealing with searches of limited categories of commercial property should not be extended to searches of persons.

Administrative searches are designed in large part to serve as a deterrent to violations of law or regulations, see *New York* v. *Burger*, 107 S. Ct. at 2644; *Donovan* v. *Dewey*, 452 U.S. at 603; *United States* v. *Biswell*, 406 U.S. 311, 316 (1972), and deterrence is one of the acknowledged goals of the Customs Service drug testing program. *See* Brief for Respondent in Opposition at 13. However, searching persons without a warrant and without probable cause (or even reasonable suspicion) in order to deter misconduct may be even more problematic than the clearly objectionable practice of conducting searches of persons without a warrant or suspicion in the hope of discovering evidence

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[10] In certain situations involving limited intrusions, this Court has required neither a warrant nor probable cause. For example, in *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court approved a limited pat-down search for weapons based upon a reasonable apprehension of danger. However, the Court emphasized that it was dealing with "an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Id.* at 20.

of past misconduct. As a general matter, our society does not permit warrantless, suspicionless searches of individuals as a means of deterring misconduct.[11]

The administrative search "exception" has been carefully limited to the search of commercial premises in closely-regulated industries. More commonly, administrative searches must be authorized by a warrant. *See Marshall* v. *Barlow's, Inc.*, *supra* (warrant or its equivalent required for search of business premises by OSHA inspector); *See* v. *City of Seattle*, 387 U.S. 541 (1967) (warrant required to effect unconsented administrative entry and inspection of private commercial premises); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) (non-emergency, unconsented code-enforcement inspection of personal residence must be authorized by a warrant).

It is true, nonetheless, that in *Shoemaker* v. *Handel* the Third Circuit extended the administrative search exception to cover breath and urine testing of jockeys and other employees in the heavily-regulated horse-racing industry, reasoning that "the persons engaged in the regulated activity are the principal regulatory concern." 795 F.2d at 1142. Significantly, the Court went on to approve random testing as well, thus holding that such tests could be conducted without a warrant and without *any* level of suspicion. This holding represents an extraordinary extension of the administrative search doctrine.[12] In any event, police

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[11] In *Griffin* v. *Wisconsin*, ___ U.S. ___ , 107 S. Ct. 3164 (1987), this Court upheld the warrantless search of a probationer's home, noting "the deterrent effect of the supervisory arrangement." *Id.* at 3170. The Court's opinion relies in part upon the reasoning of the administrative search cases. Nevertheless, in *Griffin* there was some level of individualized suspicion. Moreover, one hopes that public employees are not considered to be analogous to probationers, whose liberty interests have been restricted by virtue of a criminal conviction.

[12] The administrative search exception has also been used to uphold drug and alcohol testing, without reasonable suspicion, of employees with unescorted access to protected areas of a nuclear power plant. *Rushton v. Nebraska Public Power District*, 653 F.Supp. 1510 (D. Neb. 1987).

officers and public employees in general are not members of a "highly-regulated industry." *See Fraternal Order of Police* v. *City of Newark*, 524 A.2d at 434-435.

Recognizing the unique nature of the holding in *Shoemaker*, the Ninth Circuit refused to apply its reasoning to a drug testing program aimed at train crew members. *Railway Labor Executives' Ass'n* v. *Burnley*, 839 F.2d at 583-585. This Court similarly should decline to extend the administrative search doctrine to govern the drug screening of public employees in general.

V. Searches of Employees By Urinalysis Are Not Validated By Consent

Although consent may validate a search conducted without a warrant or probable cause, that consent must be "voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248 (1973). "Voluntariness is a question of fact to be determined from all the circumstances," *id.* at 248-249, and it "is a matter which the Government has the burden of proving." *United States* v. *Mendenhall*, 446 U.S. 544, 557 (1980). In the present case the district court found "that Customs workers who submit to the [drug testing] plan do not and have not done so voluntarily, but give and have given consent as a result of 'coercion, express or implied' . . . ." (Pet. App. 53a). Nevertheless, the court of appeals held that the "Customs Service test is, to some extent, consensual" and that "the exaction of consent as a condition of assignment to the new job is not unreasonable." 816 F.2d at 178-179 (Pet. App. 14a-15a).

It is, of course, possible that individual employees will voluntarily consent to undergo urinalysis, *see, e.g., Mack* v. *United States*, 814 F.2d at 124,[13] but most courts have recognized that it is a fiction to speak of voluntary consent when submitting to the test is a condition of continued employment. *See, e.g., American Federation of Government*

[13] Collective-bargaining agreements sometimes require an employee to cooperate in such tests.

Employees v. *Weinberger*, 651 F. Supp. at 736; *Bostic* v. *McClendon*, 650 F. Supp. at 249. The threat of losing one's job is one of the most potent forms of coercion available.

In many of the drug testing cases the government has argued that at some point in the past the employee consented to future searches. Sometimes consent forms actually have been signed. *See, e.g., McDonell* v. *Hunter*, 809 F.2d 1302 (8th Cir. 1987) (consent form signed five years before correctional employee was asked to submit to urinalysis). In other cases the government has argued that the employee impliedly consented because he accepted employment knowing that drug tests might be required, or he continued employment after a drug testing program had been announced. *See, e.g., Railway Labor Executives' Ass'n* v. *Burnley*, 839 F.2d at 589; *Caruso* v. *Ward*, *supra* note 1. However, "a search otherwise unreasonable cannot be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment." *National Federation of Federal Employees* v. *Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987). *Accord, McDonell* v. *Hunter*, 809 F.2d at 1310. Stated otherwise, " '[a]dvance consent to future *unreasonable* searches is not a reasonable condition of employment.' " *Railway Labor Executives' Ass'n* v. *Burnley*, 839 F.2d at 589, quoting from *McDonell* v. *Hunter*, 612 F. Supp. at 1131.

In the present case the government attempts to bolster its argument by comparing the urinalysis procedure to pre-employment or "fitness for duty" physical examinations. Although the analogy to pre-employment or annual physical examinations is an enticing one, it cannot serve as a justification for drug testing programs of wide application. Moreover, a physical examination which is reasonable for one purpose may become unreasonable when it is used as a pretext for searching for evidence of drug use.

Some courts have assumed, without analysis, that "[d]rug testing that is conducted as part of a bona fide health checkup is not constitutionally objectionable." *Fraternal Order of Police* v. *City of Newark*, 524 A.2d at 434 n.6.

See also Feliciano v. *City of Cleveland*, 661 F. Supp. at 586. More recently, the D.C. Circuit has explicitly held that "it is not unreasonable to require drug testing where an employee's duties involve direct contact with young school children and their physical safety, where the testing is conducted as part of a routine, reasonably required, employment-related medical examination, and where there is a clear nexus between the test and the employer's legitimate safety concern." *Jones* v. *McKenzie*, 833 F.2d at 336. The court emphasized the narrow focus of its inquiry, however, and cautioned that it was not addressing the requirements for drug testing "outside the context of a regular, employment-related medical examination." *Id.* at 335.

Although the constitutionality of requiring reasonable, routine, job-related physical examinations is not presented in this case,[14] the Court may readily recognize that "routine health examinations are far different than testing for the specific purpose of finding evidence of drugs." *Caruso* v. *Ward*, 506 N.Y.S.2d at 798. Such physical examinations cannot be used "as a subterfuge to conduct an unreasonable search and seizure," *Lovvorn* v. *City of Chattanooga*, 647 F. Supp. 875, 881 n.7 (E.D. Tenn. 1986), nor should

[14] There would seem to be significant limitations on a public employer's ability to require routine medical examinations of its employees. For example, it might not be reasonable to require every employee to submit to a routine medical examination. There is far more justification for requiring examinations of those who engage in strenuous activity, operate dangerous machinery, or carry lethal weapons than for examining those who perform routine clerical functions. In addition, the frequency of such examinations would be a matter of concern. If examinations were required too frequently, they might become unreasonably burdensome and their job-relatedness would be subject to question.

The scope of such examinations might also have to be limited. In light of dramatic advances in science, it is possible to perform all manner of medical and physiological tests which would constitute substantial invasions of privacy but have no legitimate bearing on an employee's ability to perform her job. Above all, routine physical examinations should not be used as a pretext for other types of government scrutiny.

the rationale for requiring job-related physical examinations be applied to support an intrusion which serves a much different purpose. The program at issue here "is plainly a drug testing plan and not a bona fide medical fitness plan." *Policemen's Benevolent Ass'n* v. *Washington Twp.*, 672 F. Supp. at 794.

This Court should be wary of accepting respondent's contention that the drug testing program of the Customs Service is permissible to determine fitness for duty. Although the government may have a legitimate interest in ensuring the fitness of its employees for duty, the definition of fitness and the scope of the permissible investigation may present significant issues. Tests to determine physical fitness may be permissible whereas a focus on moral fitness may raise issues of different magnitude.[15] The government's interest in determining fitness for employment might well be served by conducting warrantless searches of an employee's home, but such intrusions would hardly be permissible under the Fourth Amendment.

VI. Searches By Urinalysis Are Unreasonable Unless Based on Probable Cause or, At a Minimum, Reasonable, Individualized Suspicion

We have already discussed this Court's often-stated view that warrantless searches are *per se* unreasonable, subject only to a few well-delineated exceptions. In another line of Fourth Amendment cases the Court has focused on the command of reasonableness, observing that "what is reasonable depends on the context within which a search takes place." *New Jersey* v. *T.L.O.*, 469 U.S. at 325. "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action

[15] A drug test designed to confirm impairment on duty would seem to be related to physical fitness, but impairment also has objective manifestations which could provide probable cause or reasonable suspicion. Depending on the nature of the job, a test revealing high levels of dangerous drugs, not resulting in impairment, might be related to physical fitness. On the other hand, a mere determination that an employee has used drugs in the recent past, presumably while off duty, seems more conducive to passing judgment on moral fitness.

was justified at its inception,' . . .; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place' . . . ." 469 U.S. at 341, quoting from *Terry* v. *Ohio*, 392 U.S. at 20.[16] When making these determinations of reasonableness the Court has balanced "the need to search against the invasion which the search entails." *Camara* v. *Municipal Court*, 387 U.S. at 537. In the context of searches by public employers, this Court has balanced "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *O'Connor* v. *Ortega*, 107 S. Ct. at 1449 (plurality opinion).

In many instances, including the present case, directives to submit to urinalysis have not been justified at their inception, nor has the resulting or anticipated search been reasonable in scope. Public employers have often reacted to statistics regarding the use of drugs in society at large without any reliable information that that experience is mirrored in their particular agency. In the present case, for example, respondent acknowledged that the Customs Service was "largely drug free." Unlike most searches, uniform or random drug testing programs are prophylactic measures designed in large part to deter misconduct. Because they are not based on probable cause, or even reasonable suspicion, they are not justified at their inception.

When many persons are tested in the hope of discovering a few who use drugs, searches by urinalysis are not

[16] It is important to note that this "twofold inquiry" has its origin in a case dealing with "an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Terry* v. *Ohio*, 392 U.S. at 20. As Justice Blackmun has observed, "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *New Jersey* v. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

reasonably related in scope to the circumstances which justified the interference in the first place. Moreover, urine can be tested to discover all manner of information unrelated to the use of illegal drugs. In this respect as well the search may be overly broad.

In upholding the Customs Service program at issue here, the court of appeals undervalued the privacy interests of employees and overemphasized the government's need for drug testing to ensure the efficient operation of the workplace. The individual employee's legitimate expectations of privacy have already been discussed at some length. The magnitude of the intrusion increases exponentially when a dragnet approach to drug testing is employed. Numerous innocent individuals are required to suffer affronts to personal privacy and dignity in the hope that the government will detect those few individuals who may be abusing drugs. In the present case petitioners have reported that after "testing more than 50 persons per week for five months, Customs obtained only one confirmed positive result during the entire program: the sample of a single outside applicant was confirmed positive for marijuana" (Petition for a Writ of Certiorari at 6 n.7). Similar experience is reflected in some of the reported cases. *See, e.g.*, *Penny* v. *Kennedy*, 648 F. Supp. at 816 (2 out of 360 police officers tested positive); *Capua* v. *City of Plainfield*, 643 F. Supp. at 1511-1512 (16 out of 103 firefighters tested positive).

Drug testing by urinalysis is not so intrusive that such a search would be unreasonable even if conducted with a warrant and probable cause, *compare Winston* v. *Lee*, 470 U.S. 753 (1985) (surgery to recover bullet for use as evidence), but it is a significant intrusion "upon the individual's dignitary interests in personal privacy and bodily integrity." *Id.* at 761. The significance of the intrusion weighs in favor of more stringent requirements to approve the search, and the fact that such tests are typically directed at numerous individuals at one time compounds the intrusion and increases the need for strict limitations. The "Fourth Amendment's command that searches be 'reasonable' requires that when the State seeks to intrude upon

an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable'." *Id.* at 767.

We do not suggest that drug testing by urinalysis is more intrusive than taking a blood sample or searching one's home. Nevertheless, it surely is comparable to such intrusions, which ordinarily must be authorized by a warrant issued upon probable cause. It would also seem to be more intrusive than a protective pat down for weapons, which must be based upon a reasonable apprehension of danger. *Terry* v. *Ohio*, *supra*. Ordinarily even a search of an employee's office by a supervisor must be based upon "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work related misconduct, or that the search is necessary for a noninvestigative work related purpose such as to retrieve a needed file." *O'Connor* v. *Ortega*, 107 S. Ct. at 1503.

It also is revealing to compare justifications for various intrusions. Few justifications are more valid than preventing the shooting or stabbing of a police officer, yet a protective pat-down for weapons must be based on a reasonable apprehension of danger. Society also has a vital interest in detecting and punishing criminal behavior, yet searches designed to further these goals ordinarily must be based on probable cause. In light of these comparisons, it would be an extraordinary interpretation of the Fourth Amendment to allow searches by urinalysis without a warrant and without any level of suspicion.

We do not quarrel with the proposition that the government has a legitimate interest in ensuring that its employees do not use illegal drugs.[17] It appears, however, that the importance of that interest has been exaggerated and that an inappropriate tool has been chosen to further

[17] If the use of illegal drugs is detected, a focus upon rehabilitation may be more appropriate than dismissal or disciplinary action.

it.[18] Surely that interest is no more important than the government's interest in detecting and punishing criminal activity. Nevertheless, when members of the FOP are engaged in the battle against illegal distribution of narcotics and dangerous drugs, they are rightfully expected to abide by Fourth Amendment requirements. In most cases they are expected to have probable cause and a warrant before conducting a search.

Among those courts which have addressed drug testing programs there has developed an impressive consensus that such tests must be based upon reasonable, individualized suspicion. One of the first cases to consider this issue was *Turner* v. *Fraternal Order of Police*, where the court considered the facial constitutionality of regulations which provided that police officers could be ordered to submit to urinalysis if "suspected of drug use" by a Department official. The District of Columbia Court of Appeals construed the term "suspected" as requiring "a reasonable, objective basis to suspect that a urinalysis will produce evidence of an illegal drug use." 500 A.2d at 1009.

Later decisions have agreed that the Fourth Amendment allows a public employer to demand a urine sample from an employee "only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences from those facts in the light of experience, that a urinalysis will produce evidence of illegal drug use by that particular employee." *Bostic* v. *McClendon*, 650 F. Supp. at 250. *See also Feliciano* v. *City of Cleveland*, 661 F. Supp. at 589; *Lovvorn* v. *City of Chattanooga*, 647 F. Supp. at 882; *American Federation of Government Employees* v. *Weinberger*, 651 F. Supp. at 773; *Patchogue - Medford Congress of Teachers* v. *Board of Education*, 510 N.E.2d at 330. This standard of reasonable, individualized suspicion recognizes and adequately accommodates the legitimate needs of the government. *Policemen's Benevolent Ass'n* v. *Wash-*

[18] More appropriate tools include efforts to educate employees about the dangers and costs of drug abuse and the establishment of drug rehabilitation programs.

ington Twp., 672 F. Supp. at 790. Although the government has sought more latitude in this case and many others, it must be recognized that "the imposition of an individualized, reasonable suspicion standard rather than the more stringent probable cause standard is already a significant concession of deference to the state's legitimate interest." *Capua* v. *City of Plainfield*, 643 F. Supp. at 1518.

In two recent and highly relevant decisions this Court did not decide whether individualized suspicion was an essential element of the standard of reasonableness it adopted to govern specific categories of searches. *O'Connor* v. *Ortega*, 107 S.Ct. at 1503; *New Jersey* v. *T.L.O.*, 469 U.S. at 342 n.8. (These cases both involved searches of property, not persons, however, and in both cases individualized suspicion did exist). The Court has previously observed that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States* v. *Martinez-Fuerte*, 428 U.S. at 561. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal," however. *New Jersey* v. *T.L.O.*, 469 U.S. at 342 n.8. "When the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979).

Drug testing by urinalysis certainly is not a "minimal" intrusion upon privacy interests. The fairness or reasonableness of such an intrusion depends in large part upon the behavior of the individual being tested. In order to protect individual rights in this context, the quantum of suspicion, whether probable cause or reasonable suspicion, must be individualized. "Absent a requirement of individualized suspicion, the Fourth Amendment would cease to protect against arbitrary government intrusion." *Capua* v. *City of Plainfield*, 643 F. Supp. at 1517.[19]

[19] "By the nature of the search and the information sought, . . . urinalysis is a much greater invasion of privacy than a search of an employee's office." *Feliciano* v. *City of Cleveland*, 661 F. Supp. at 588. The balance of interests is therefore much different than that considered in *O'Connor*. "When the severely intrusive nature of urinalysis is added to [the] calculation, it is obvious that a reasonable individualized suspicion that a police officer is using illicit drugs must be required for urinalysis to be reasonable under all the circumstances." *Feliciano*, 661 F. Supp. at 589. When it considered a similar testing program, the Ninth Circuit recently held "that particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception." *Railway Labor Executives' Ass'n* v. *Burnley*, 839 F.2d at 587.

A requirement of reasonable, individualized suspicion will not hinder the government unduly. Few public employees work in isolation. Police officers, for example, are subject to constant observation by their superiors and co-workers and by the public at large. When the use of illegal drugs has an impact on the performance of duties, it should be detectible without resort to uniform or random drug screening. It is instructive to note that in a number of the reported cases the government did in fact have reasonable suspicion. *See, e.g.*, *Everett* v. *Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987); *Perez* v. *Ward*, 69 N.Y.2d at 842, 507 N.E.2d at 296. In *Penny* v. *Kennedy*, for example, only 2 out of 360 police officers tested positive. The court found it "noteworthy that the Police Department did have facts amounting to a reasonable suspicion that would have allowed the testing of the only two officers who tested positive . . . ." 648 F. Supp. at 817. Likewise, in *Smith* v. *White*, 666 F. Supp. 1085 (E.D. Tenn. 1987), which involved the urine testing of public safety officers at a nuclear power plant, an investigation of drug use had led to reasonable suspicion concerning certain employees. Each of the employees who was directed to give a urine sample was handed a memorandum which set forth the information creating reasonable suspicion that the person had used, sold, or possessed illegal drugs. *Id.* at 1087.[20]

[20] Law enforcement officers should not be required to submit to urinalysis based simply on their duty assignment, because testing on this basis fails to satisfy the requirement of individualized suspicion. *See Fraternal Order of Police* v. *City of Newark*, 524 A.2d at 437 (dis-

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Drug testing of public employees is a controversial topic which this Court undoubtedly will address on more than one occasion. We urge the Court to hold that compulsory urinalysis of public employees constitutes a search under the Fourth Amendment. Precedent and reason suggest that such searches should be authorized by a warrant issued upon probable cause. At a minimum the Court should require that compulsory urinalysis of public employees be based upon reasonable, individualized suspicion.

CONCLUSION

Insofar as it permits drug screening by urinalysis to be conducted without a warrant, without probable cause, and without reasonable, individualized suspicion, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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approving directive that members of Narcotic Bureau be urine tested upon transfer into Bureau and at least twice a year afterwards); *Caruso* v. *Ward*, 506 N.Y.S.2d at 799 (invalidating order requiring random drug testing of officers in Organized Crime Bureau).

APPENDIX

RESOLUTION NO. 17

WHEREAS: Drug testing of employees by employers has grown to be a major issue in our society, and

WHEREAS: Police agencies have, in many cases, initiated testing of both police applicants and sworn officers, and

WHEREAS: Many such programs have been instituted in a haphazard fashion and in situations where no need for such programs even existed, and

WHEREAS: The Fraternal Order of Police shares concerns over both drug and alcohol abuse by police officers, but bear an equal concern over the protection afforded citizens under the Constitution, and the rights and reasonable treatment of police officers, and

WHEREAS: The Fraternal Order of Police feels testing programs should reflect all of these concerns.

NOW, THEREFORE BE IT RESOLVED:

That the members of the Fraternal Order of Police here assembled in Mobile, Alabama for the Forty-Eighth Biennial Conference of this Order declare a national policy for this organization, and further direct the Legislative Committee to support legislation, that would include the following provisions:

1. All drug and alcohol testing policies must conform to the Fourth Amendment rights regarding unreasonable searches and seizures, including a reasonable suspicion requirement for case-by-case testing of sworn officers.

2. Agencies establishing drug testing programs for sworn officers will first establish need based on agency experience, and officers will not be tested simply because of their being police officers or because of their particular assignment.

3. Officers being tested will be protected by confidentiality, by verifying backup analysis and by other such suitable checks and balances.

4. In the event of "positive" tests for legally obtained drugs, the emphasis of the agency would be on treatment and rehabilitation rather than punishment.

5. Any drug testing policy should be developed, drafted and implemented as a joint effort of management and any employee organization within the agency to maximize both fairness and support for the policy.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 86-1879

In The

Supreme Court of the United States

October Term, 1987

NATIONAL TREASURY EMPLOYEES UNION, et al.,

v. *Petitioners,*

WILLIAM VON RAAB, Commissioner, United States Customs Service,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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No. 86-1879

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of respondent. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating in litigation affecting

public policy. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

The Customs Service has a great interest in taking reasonable steps to ensure that its employees involved in stopping the flow of illegal drugs into this country are not a part of the problem they are charged with the duty to stop. Pacific Legal Foundation, its members, and supporters share this concern. Pacific Legal Foundation's public policy perspective and litigation experience will help provide this Court with additional arguments relevant to the proper resolution of this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 816 F.2d 170 (5th Cir. 1986).

STATEMENT OF THE CASE

In July of 1986, the United States Customs Service, the federal agency charged with the duty to stop narcotics smuggling, implemented a urinalysis drug testing program for employees in certain jobs. Applicants for or current employees seeking transfer to one of the following kinds of positions must submit to urinalysis: positions that directly involve the interdiction of illicit drugs, positions that require the carrying of a firearm, or positions that involve access to classified information.

The prospective employee is notified that he must undergo urinalysis for drugs within five days of notification. The employee may refuse the test and withdraw his application with no adverse consequences. The employee who agrees to the urinalysis as a condition of employment lists the medications he has taken in the preceding 30 days. The list is sealed and remains unopened unless the test is positive. The employee furnishes the urine sample in private. The regulations do prohibit, however, the carrying of a purse or jacket into the restroom stall in order to prevent the substitution of a phony sample. The Customs Service has a strict chain of custody procedures to ensure that the samples and test results are identified with the proper person.

The urinalysis tests for marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP). First, an enzyme multiplied-immunoassay test (EMIT) is used. Second, positive results are retested using gas chromatography/mass spectrometry (GC/MS). Both parties apparently agree that GC/MS is highly accurate as

a test for the presence of drugs. *National Treasury Employees' Union v. Von Raab*, 816 F.2d at 174. However, drugs used five days or more before the test will not show on the test results. *Id.*

The petitioner, National Treasury Employees Union, sued on behalf of current employees seeking a job transfer to enjoin this drug testing program on various constitutional grounds. The District Court permanently enjoined the program, holding it was an unreasonable search and seizure in violation of the Fourth Amendment in that it was not based on probable cause or reasonable suspicion. The court also held the plan violated the prohibition on self-incrimination, penumbral constitutional rights of privacy, and the Due Process Clause because of its unreliability. The Customs Service appealed to the Fifth Circuit Court of Appeals.

The Court of Appeals held that the urinalysis was a search for Fourth Amendment purposes, but also that it was reasonable. The Court of Appeals did not decide any of the other constitutional issues. The court considered the following factors: the scope and manner of the test, the governmental interest, the place, voluntariness, the employment relationship, administrative nature of the search, similarity to regulated industry, availability of less intrusive methods, and effectiveness.

The petitioners petitioned this Court for a writ of certiorari. The petition was granted on February 29, 1988.

SUMMARY OF ARGUMENT

The Fourth Amendment only prohibits unreasonable searches and seizures. Reasonableness is determined by balancing the competing interests involved. The petitioners' interests in keeping either urine or information contained therein private is minimal. The Customs Service has strong interests in ensuring that those whom it places in contact with illegal drug traffic are not a part of the problem. The Customs Service as a law enforcement agency also has an interest in the credibility of its employees. Integrity as well as public confidence is undermined when law enforcers break the very laws they are employed to enforce. The Customs Service also shares the interests of any employer in knowing whether its employees are engaged in the criminal activity of drug abuse. These interests are sufficiently greater than those of the employees in avoiding this drug testing program.

ARGUMENT

I

THE CUSTOMS SERVICE'S DRUG TESTING PROGRAM IS REASONABLE BECAUSE PETITIONERS' INTERESTS ARE MINIMAL

Amicus agrees with the Court of Appeals that the urinalysis in this case does constitute a "search" for purposes of the Fourth Amendment. People have reasonable expectations that the chemical characteristics of their urine are private and not generally open to the public. However, merely because government action is a search and people have reasonable expectations of privacy does not mean the warrantless search is proscribed by the Fourth Amendment. Only searches that are *unreasonable* are prohibited. *O'Connor v. Ortega*, 480 U.S. ___, 94 L. Ed. 2d 714, 724 (1987). "A determination of the standard of reasonableness applicable to a particular class of searches requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *Id.* (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

On the employees' side of the balance, there are several privacy interests. One is to avoid the embarrassing process of providing a urine sample in the first place. However, a urine sample is a routine part of modern physical examinations. If a prospective employee cannot be required to provide a sample for this drug testing program, urinalysis unrelated to drugs as part of a physical examination, or even a physical examination itself, would be suspect as well.

This particular drug testing program, however, is well tailored to respond to that privacy interest. Unlike other testing programs, the employee is not visually observed during urination. *Cf. Capua v. City of Plainfield*, 643 F. Supp. 1507 (D. N.J. 1986). The process takes place within the four walls of a public restroom stall, a very private place. One cannot imagine any more private method which would not sacrifice reliability.

Another privacy interest the employee holds is in the information he provides about legitimate medications he is taking which may affect the test. However, this list remains sealed unless the urinalysis comes back with a positive test. Then, and only then, will the listed medications be revealed. The privacy interest is minor since the information is revealed only if necessary and only for exculpatory purposes.

Furthermore, a ruling that one cannot be required to notify the government about legitimate drug use would be contrary to this Court's decision in *Whalen v. Roe*, 429 U.S. 589 (1977). *Whalen* held that the State of New York's recording of names and addresses of persons who obtained prescription drugs did not violate anyone's right to privacy. Disclosure of the information to the general public was forbidden. *Id.* at 593-95. Likewise, drug information in this case is not publicized and, therefore, can be required from employees.

Finally, the employees claim to have a privacy interest in the information obtained from the urinalysis itself. This is the primary argument that the tests reveal information about their private lives. Some have

argued that urinalysis can reveal whether someone is pregnant, diabetic, or epileptic. *See* 816 F.2d at 176. However, there is nothing to suggest that the Customs Service is checking for pregnancy, diabetes, or epilepsy. It may be true that one *could* test for those characteristics, but this program does not do so.

Urinalysis is the one kind of search in which the government only obtains evidence of criminal activity. No legitimate aspects of the life of the one tested is revealed. The obvious concern of the Fourth Amendment's requirement of a reasonable expectation of privacy is that searches normally reveal private and noncriminal aspects of one's life. One cannot search a home and not see private, legitimate information irrelevant to the object of the search. That is not the case with urinalysis. Urinalysis is as if law enforcement officers could enter one's home with a filter over their eyes to block vision to every private aspect of one's life, except criminal activity. This is not a meaningless analogy of science fiction. With drug testing one can search for the items sought without revealing any legitimate activity. The Customs Service can and should be allowed to limit its vision to see only evidence of a crime.

Employees also have an interest in the accuracy of the tests, perhaps a due process interest. The parties apparently agree that the GC/MS test is highly accurate. *See Von Raab*, 816 F.2d at 174; *see also American Federation of Government Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986) (EMIT is 95-99% accurate; GC is 100%). Inaccuracy is no basis for reversing the appellate court's decision.

II

THE CUSTOMS SERVICE'S DRUG TESTING PROGRAM IS REASONABLE BECAUSE THE GOVERNMENT INTERESTS SUPPORTING THE PROGRAM ARE SUBSTANTIAL

The Customs Service has a significant interest in ensuring that the employees in the three types of jobs are drug free. As a public servant to the people of this country, the Customs Service's interests reflect the public interest generally. The Customs Service has an interest to ensure its employees are not impaired by drugs while on the job. The argument that one should be tested only if there is a reasonable suspicion from observation of drug impairment is practically unfeasible. One court recognized that drug use is undetectable by simple observation 95% of the time. *Schaill ex rel. Kross v. Tippecanoe County School Corporation*, 679 F. Supp. 833 (N.D. Ind. 1988). Waiting for observable behavior prior to drug testing is like locking the barn after the horses are gone. The Customs Service should not have to wait for some "accident," error in judgment, bizarre behavior, or catastrophe by its employee before testing for drugs. The Court should not impose the "wait and see" practice, unfortunately used in the railroad industry, on employers generally. *See Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988).

A reasonable suspicion from mere observation also creates more problems than it purports to solve. One benefit of urinalysis is that it does not involve some official's subjective discretion in deciding when and

which employees should be tested. The Court recognized in *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976), that regularized checkpoints along highways which do not involve an official deciding at whim who and who not to stop are reasonable because of that fact. A reasonable suspicion requirement for urinalysis would only create a mechanism whereby unfairness could result from the discretion of the one who decides who gets tested. Testing of everyone as in this case is the most fair manner.

This interest in guaranteeing employees are not impaired is especially strong for the positions the Customs Service is testing. The employees are not coming into contact with illicit drug traffic only incidentally to performance of their job. The Customs Service affirmatively puts these employees in contact with drug suppliers for the purpose of making such contacts. It would be wholly irresponsible for the Customs Service to assign people who use illegal drugs to contact with their problem or to carry a firearm or to know classified information. The Customs Service should not be a source of temptation to break criminal laws.

The Customs Service also has an interest in making sure employees in these jobs do not use illegal drugs regardless of a direct impairment of function while on duty. One interest is in its reputation and credibility. Customs officials are involved in enforcement of a specific body of laws, rather than general purpose law enforcement. Nevertheless, public confidence in customs agents who use drugs even off the job will wane. People will reasonably suspect and believe, whether true or not, that agents who are officially in

contact with such drugs and also use such drugs are corruptly linked with the drug trafficking business.

People in law enforcement have demands on their character unique to their profession. Abstinence from illegal drugs or any illegal practice may not be relevant to job qualifications for many jobs, but for people in law enforcement it is a bona fide occupational qualification. One who is both impaired from drug use and carries a gun is an obvious danger to himself and those who work with him. Hallucinogens cause flashbacks which distort perception even after the drugs are eliminated from the body. *See* United States Drug Enforcement Administration, *Drugs of Abuse* 49 (1985). A person affected by drugs should not be armed by the government.

Due to the high cost of drugs, people who are dependent on drugs and have access to classified information may have a greater willingness to exchange information for drugs. The integrity of the Customs Service would be unnecessarily at stake. Drug testing is a reasonable approach to ensure that those involved in drug law enforcement are not violating the laws they are sworn to enforce.

Moreover, all employers have some interests in having a drug free work force. One, some drugs have a long term effect on people which decrease their productivity for all time, not just when "under the influence." *Drugs of Abuse* at 37 and 49. Employers have an interest in not paying for employees who have a diminishing worth. Two, since many illegal drugs create a high susceptibility to addiction, employers have an interest in preventing their employees from becoming worthless

to the employer through addiction. *Id.* at 30-31. Three, employees who use illegal drugs on their own time are engaged in an illegal activity. Employers run the risk that an employee will be arrested and, therefore, be unavailable for work. Employees who use drugs are also more likely to abuse sick leave privileges. National Institute on Drug Abuse, *Developing an Occupational Drug Abuse Program* 10 (1985).

This Court recently recognized that impairment of functions while on the job is not the only evil employers have a legitimate interest in stopping. In *Employment Division, Department of Human Resources v. Smith*, 56 U.S.L.W. 4357 (Apr. 27, 1988), former drug counselors were fired because of their use of peyote for religious purposes. Such use would obviously take place off the job. Unemployment compensation was denied by the State of Oregon. This Court remanded the case to the Oregon Supreme Court to determine whether Oregon criminal law prohibited the use of peyote for *religious* purposes.

Implicit in the Court's remand is a recognition that employers can legitimately fire employees who use illegal drugs on their own time, regardless of impairment while on the job. If employers could not control employees' off duty use, the First Amendment issues would never arise and the remand would have been unnecessary. Contrary to petitioners' claim in the present case, impairment while on the job is not the Customs Service's only legitimate concern.

Although constitutional rights are not subject to the outcome of a commercial plebiscite, the increasing

number of drug testing programs in the private sector is not insignificant. The Court of Appeal noted that more than 25% of the Fortune 500 companies use some form of urinalysis drug testing for their employees. The increased use of drug testing in the private sector suggests that urinalysis for employees is an employment practice which society in general is recognizing as reasonable. Reasonableness is always a relative concept. It would be anomalous to declare a practice unreasonable which many employers and employees have voluntarily agreed to use in the private sector. The prevalence of drug testing in society suggests that society considers the concept to be reasonable. This is especially true in this case because the drug testing program is not for the purpose of enforcing criminal laws against employees generally. *See O'Halloran v. University of Washington*, 679 F. Supp. 997 (W.D. Wash. 1988).

The Customs Service interests in having drug free workers assigned to these classes of jobs are substantial. The interests of employers generally coupled with the interests of the Customs Service as a law enforcement agency attempting to stop drug smuggling demand the conclusion that its drug testing program is reasonable.

CONCLUSION

The petitioners' interests in keeping evidence of drug use from the employer, the Customs Service, are minimal. On the other hand, the Customs Service's interests in credibility, competence, and integrity in its

employees outweighs the mild intrusiveness of this particular drug testing program. The program is reasonable in light of all the circumstances relating to the Customs Service's unique role in society and the safeguards in the program for employees. As a reasonable search, the Court of Appeals was correct in holding that it was not prohibited by the Fourth Amendment.

DATED: May, 1988.

Respectfully submitted,

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NATIONAL TREASURY
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vs.

WILLIAM VON RAAB, COMMISSIONER,
UNITED STATES CUSTOM SERVICE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF RESPONDENT

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The California Employment Law Council ("CELC" or "Amicus") submits this brief as amicus curiae in support of Respondent.[1]

INTEREST OF AMICUS CURIAE

The CELC is a voluntary, nonprofit organization of more than 60 companies doing business in California. While CELC member companies come from diverse industries, most are large, public corporations employing many thousands of employees. The CELC was formed to promote the common interest of employers and the public in fostering reasonable and equitable employment law.

While the CELC is composed solely of private sector employers, it has a strong interest in the right of employers — including governmental employers — to ensure a drug-free workplace. The instant case has far-reaching implications for drug testing by private sector employers.

Although the instant case raises Fourth Amendment issues not *directly* applicable to the private sector, the Ninth Circuit has already used Fourth Amendment analysis to prohibit drug testing by nongovernmental employers. *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087, 1093 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1631 (April 1, 1988).

Furthermore, California's state constitution specifically guarantees a right of privacy in Article I, Section 1. Already, trial courts in California are applying the state constitutional guarantee of privacy in drug testing cases. Fourth Amendment cases, of course, raise questions of legitimate expectations of privacy. This Court's reasoning in the instant case, therefore, will likely weigh very heavily in the development of California and other state law in the drug testing area.

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[1] The parties have consented to the filing of this brief.

Accordingly, the CELC is intensely interested in the outcome of this case and of other drug testing cases before the Court.[2]

SUMMARY OF ARGUMENT

The CELC recognizes that the case law relevant to the Fourth Amendment issues will be thoroughly addressed by the Solicitor General and, most likely, by several other amici. The CELC, by contrast, believes it can be most helpful to the Court by sharing the perspective gained from the experience of CELC's member companies. The CELC's argument is threefold:

First, drug abuse presents a real and very serious problem for American employers. Drug abuse is not merely the current fashionable topic or fad issue. The experience of CELC companies attests to the severity of the drug abuse problem. This experience is reinforced by reputable surveys, studies, and reports.

Second, drug testing is the only way for employers to assure the fitness of their employees. Supervisory observation does not work, because unfitness due to drug abuse (as distinguished from alcohol abuse) often does not manifest itself until tragedy strikes. Many jobs also do not entail close supervision. Furthermore, in today's litigious environment, supervisors are understandably reluctant to single out an employee for suspicion of drug use based on subjective and possibly mistaken observations.

Third, drug testing is not unduly intrusive. It intrudes less upon individual privacy, and is less embarrassing a

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[2] The CELC filed an amicus brief in support of the Government's petition for certiorari in *Burnley v. Railway Labor Executives Assoc.*, No. 87-1555, which was granted June 6, 1988. *Burnley* has been consolidated for argument with the instant case.

procedure, than a routine medical examination. Medical examinations to determine employee fitness have long been allowed virtually without question. Medical examinations routinely involve the taking of a urine sample for purposes of urinalysis. That the urine sample may be tested for the use of cocaine, as well as for the presence of diabetes, for example, does not materially add to the intrusiveness of the examination.

There is a subtle but unmistakable undertone to the arguments advanced by and on behalf of the Petitioners herein: that illicit drug use in the privacy of one's own home is nobody else's business — particularly an employer's. As the ACLU complained in its amicus brief, urine drug testing "allows the government to monitor off-duty conduct not otherwise exposed to public scrutiny." (ACLU Amicus Brief, p. 23). To be sure, no one advocates drug abuse. But the arguments by and on behalf of Petitioners are striking in their unrealistic assumption that off-duty drug use and on-the-job performance are wholly separate and distinct.

The CELC submits that employers' need for drug testing is not to satisfy some prurient curiosity about their employees' private lives — even if those private lives entail unlawful activities. Rather, the reality is that the particular unlawful activity at issue — drug abuse — profoundly affects employees' fitness for work. Employers have a strong, legitimate interest in discovering drug abuse before serious damage is done at the workplace.

ARGUMENT

I. Drug Abuse Is A Severe Problem For Employers

The statistics concerning drug abuse in society at large are nothing less than startling. According to a National Institute on Drug Abuse ("NIDA") epidemiologist, "[T]he level of drug use in the United States is higher than that in any other industrial nation."[3] NIDA's 1985 National Household Survey on Drug Abuse found nearly 37 million Americans age 12 or older — about 1 in 5 — used illegal drugs within the last year. Twelve percent age 12 or older used an illicit drug at least once within the last month.[4]

Today, 10 percent of Americans over the age of 12 use marijuana.[5] Six million people report that they use marijuana almost daily, and among 20 to 40 year olds who are working, 1 in 6 (16 percent) smoke marijuana at least once a month.[6] The marijuana now being used contains nearly three times the active agent (tetrahydrocannabinol or "THC") than it did ten years ago, thanks to sophisticated cultivation techniques and hybrid seeds.[7]

Since 1982, cocaine use has doubled.[8] An estimated 25 to 30 million Americans have used cocaine.[9] Clearly, cocaine is a growth stock in the illicit drug market; current users

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[3] *Alcohol and Drugs in the Workplace, Costs, Controls and Controversies*, a BNA special report, at 11 (1985) (hereinafter cited as "*Alcohol and Drugs in the Workplace*").

[4] *NIDA Notes*, U.S. Dept. of Health and Human Services, December 1986, at 3.

[5] *U.S. News and World Report*, June 22, 1987, at 35.

[6] *NIDA Notes*, *supra* n. 4, at 3.

[7] *U.S. News and World Report*, July 28, 1986, at 48.

[8] *U.S. News and World Report*, June 22, 1987, at 35.

[9] *Industry Week*, October 27, 1986, at 34.

(defined as "used within the last month") increased from 4.2 million in 1982 to 5.8 million in 1985.[10]

Marijuana and cocaine — the most prevalent and fastest growing illegal drugs, respectively, do not, of course, tell the whole story. There are half a million heroin addicts in the United States, and hospital admissions related to the use of cheap Mexican heroin, dubbed "black tar" or "tootsie roll", are increasing.[11] It is estimated that a million Americans use sedatives without a prescription.[12] Newest on the illicit market are the so-called "designer" drugs — synthetic drugs known by such names as "ecstasy" — that are manufactured in clandestine laboratory operations. An agent of the California Attorney General's Bureau of Narcotics Enforcement confirmed that these "designer" drugs are "more potent and more toxic than anything we've ever seen on the street."[13] One designer drug — fentanyl — is 100 times more potent than morphine and 20 to 40 times stronger than heroin.[14]

The harsh reality is that illicit drugs could not and did not become so prevalent in society at large without also invading the American workplace. NIDA has concluded that "drug abuse is the most common health hazard in the American workplace."[15] In a report prepared last year by the U.S. Chamber of Commerce, it was estimated that as many as 23 percent of all U.S. workers use dangerous drugs

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[10] *NIDA Notes*, *supra*, n. 4, at 2.

[11] *U.S. News and World Report*, June 22, 1987, at 35.

[12] 120 *BNA Labor Relations Reporter* 321, December 16, 1985.

[13] *Discover*, August 1986, at 24.

[14] *Id.*

[15] D. Copus, *Matters of Substance: Alcohol and Drugs in the Workplace*, a National Employment Law Institute Publication, at 2-3, (1987).

on the job.[16] Another employer organization, the National Employment Law Institute, estimated in a 1987 publication that 99 percent of cocaine users use the drug while at work.[17]

A New Jersey hospital drug hotline conducted a poll in which 75 percent of the drug users questioned admitted using illegal drugs on the job.[18] Eighteen percent said they had stolen from co-workers to support their habit, and 44 percent admitted selling drugs at work.[19]

Substance abuse is certainly not limited to any particular segment of the workforce. Numerous studies have shown that a wide variety of white collar workers and professionals are affected. For example, in a survey of 300 advertising directors, 15 percent reported cocaine being used as "under-the-counter" compensation.[20] Drug addiction may be four to six times more common among medical professionals than among the general population.[21]

The human and monetary costs of drug abuse to employers, employees, and consumers are monumental. Drug users are involved in three times as many accidents as nonusers, are absent from work two-and-a-half times as often, run up three times the medical costs, and are seven times more likely to have wage garnishments.[22] Numerous studies have confirmed that drug abuse results in decreased product quality and increased grievance submissions,

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[16] M. de Bernardo, *Drug Abuse in the Workplace: An Employer's Guide*, at 12 (1987).

[17] D. Copus, *Matters of Substance: Alcohol and Drugs in the Workplace*, *supra* n. 15.

[18] *Wall Street Journal*, August 8, 1985, at 8.

[19] *Alcohol and Drugs in the Workplace*, *supra* n. 3, at 15.

[20] *Time*, March 17, 1986, at 52.

[21] *Los Angeles Times*, October 5, 1986, at I-2.

[22] *BNA Daily Labor Report*, May 2, 1985, at C-1.

employee turnover, and interpersonal and morale problems.[23] In a 1986 national survey of employee attitudes, 20 percent of employees polled believed that drug usage seriously affects their company's performance.[24]

One California company intentionally overproduces to compensate for products that will be spoiled by employees who snort lines of cocaine on the microscope slides used in production.[25] Police estimated that, at one high-tech company, 80 percent of the employees were using drugs, and each user had stolen a computer terminal at least once to finance his or her drug habit.[26]

Of course, safety hazards created by drug abusers are a critical concern. The most notable recent tragedy was the January 4, 1987, Amtrak collision with three Conrail freight locomotives that killed 16 people and injured 174 others at Chase, Maryland. The National Transportation Safety Board recently concluded that the accident was attributable to the Conrail engineer's impairment by marijuana. The engineer and front brakeman have admitted smoking marijuana prior to the accident.[27] Drugs were also implicated in train crashes in Colorado and Wyoming that killed seven Burlington Northern Railroad crewmen in 1984.[28] From January 1987 through January 1988 — a 13-month period — there were 10 accidents in which the

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[23] See statement of Dr. William Mayer, Administrator of Alcohol, Drug Abuse, and Mental Health Administration before Senate Labor Subcommittee on Employment and Productivity. *BNA Daily Labor Report*, July 14, 1982, at E-1.

[24] *BNA Daily Labor Report*, July 8, 1987, at A-13.

[25] *Newsweek*, August 22, 1983, at 52.

[26] *Christian Science Monitor*, July 21, 1986, at 3.

[27] Federal Railroad Administration's Proposed Rules, Federal Register, Vol. 53, No. 90, May 10, 1988, at 16641, (hereinafter cited as "FRA's Proposed Rules"); *Los Angeles Times*, March 26, 1987, at II-2.

[28] *Wall Street Journal*, August 8, 1985, at 8.

Federal Railroad Administration found that drug use played a causal or contributory role. These 10 accidents (including Chase, Maryland) accounted for 18 fatalities, 220 injuries, and $18,725,628 in property damage.[29]

At least four accidents involving Southern California Rapid Transportation District buses in 1986 allegedly involved drug abuse. In one, a driver reportedly tested positive for marijuana after ramming his bus into another bus, injuring 27 passengers.[30]

The danger to the public from drugs in the workplace was emphasized in a recent report of the International Labor Organization, which found that drug abuse is most prevalent among long distance truck drivers, airline pilots, assembly line workers, and doctors and nurses.[31] The potential for disaster was highlighted in a recent Stanford University study of airplane pilots. Ten pilots were first trained on flight simulators to "land" on a runway, and then they were given marijuana. A full 24 hours after taking marijuana, their performance was still adversely affected. One pilot missed the runway entirely.[32]

Drug abuse has also threatened the safety of America's space program. The medical director of a government contractor working on the space shuttle program reported that between 1981 and 1985 he treated employees who had used marijuana, PCP, and heroin at work.[33] Some employees had hallucinated or collapsed on the job from

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[29] FRA's Proposed Rules, at 16641.

[30] *The Orange County Register*, August 16, 1986, at A-4.

[31] 124 *BNA Labor Relations Reporter* 7, January 5, 1987.

[32] J.A. Yesavage, M.D., V.O. Leirer, Ph.D., Lt. Cdr. M. Denari, and L.E. Hollister, M.D., "Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report," *Am. J. Psychiatry* 142:11 at 1326-28 (November 1985).

[33] *Time*, March 17, 1986, at 52.

drug use. Incredibly, up to 25 percent of workers at the final assembly plant for the space shuttle may have been under the influence of drugs or alcohol on the job.[34]

Even more frightening is the danger posed by drug users who work in nuclear power facilities. Quite recently, six people, including two employees, were arrested for possession and sale of cocaine at a California nuclear power plant.[35] During the same month, two employees at Pennsylvania's Three Mile Island Nuclear Power Station were dismissed after testing positive for illegal drugs. Since March 1986, when the formal drug testing program began at Three Mile Island, 16 employees have tested positive for drugs.[36]

As troubling as these statistics are, statistics do not tell the whole story of drug abuse in the workplace. As one official has stated, even the most impressive statistics "can never truly reflect the amount of human suffering, pain, misery and disruption of family life which can be associated with an individual's alcohol or drug abuse."[37]

Of particular concern to CELC has been the experience of its own member employers. The following is merely a sampling of serious drug-related incidents that have occurred at three CELC member companies or their subsidiaries, which have been reported to CELC.[38]

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[34] *Id.*

[35] *Los Angeles Times*, June 18, 1987, at II-2.

[36] 1 *The National Report on Substance Abuse* 6, June 24, 1987.

[37] Statement of Dr. William Mayer, Administrator, Alcohol, Drug Abuse and Mental Health Administration, U.S. Public Health Service, before Senate Labor Subcommittee on Employment and Productivity, reported in *BNA Daily Labor Report*, July 14, 1982, at E-1.

[38] These incidents are all on file with CELC; Detailed information on each incident is available from CELC upon request.

(a) A Unocal miner was killed when his equipment crashed at the bottom of a long incline. The equipment and all safety controls proved to be in working order. An autopsy determined that the miner had substantial levels of marijuana metabolites in his body at the time of the accident, but co-workers at the scene had not noticed any impairment.

(b) A Times Mirror employee, while under the influence of a drug, drove a company vehicle up a freeway off-ramp in the wrong direction and collided head-on with another automobile. As a result of the accident, the driver was mentally and physically disabled.

(c) An Arco refinery worker turned a wrong valve and severely burned himself. He tested positive for marijuana.

(d) A Times Mirror worker who was under the influence of PCP broke into executive offices. It took the combined efforts of 14 people from company security forces and the local police department to apprehend and remove him.

(e) While hallucinating on PCP, a Times Mirror employee jumped onto a conveyer belt that enters a machine that bundles newspapers. But for quick action by a fellow employee, the PCP user might well have been killed or seriously injured.

(f) A Unocal truck driver, driving a 20-ton haul truck, forgot to dump his load. When he started to back down into an open pit mine, the full load caused the brakes to fail. The driver, who tested positive for marijuana,

escaped serious injury, but a $250,000 truck was demolished.

(g) A female employee of Times Mirror came to the medical department with a bloody nose. Examination revealed that she had a perforated septum. When questioned about possible drug use, she admitted to heavy cocaine use and stated she was prostituting herself to support a habit that cost her $500 to $1,000 per day.

(h) A driver of Arco tanker-trucks — containing highly volatile fuel — returned from medical leave testing positive for cocaine.

(i) Because of the concern expressed by union leaders and others about the dangers presented by drug abuse at work, one Times Mirror company polled all employees about their perception of drug use by fellow workers. Of those who responded, more than 40% said they felt there was a drug problem at work, and many identified specific departments as problem areas. Another 40% said they did not know if the company had a drug problem. Only 20% said they did not think there was a drug problem at the company.

These three CELC member companies are not, of course, alone in their experiences with drug abuse. Many CELC members have had similar experiences. The point is this: In the workplace as it really is, drug abuse is a severe problem. As the CELC concluded in a report issued last September, "The cost and danger to employers, employees and the

general public from drug and alcohol abuse in the workplace are immense."[39]

II. Drug Testing Is The Only Practical Weapon Employers Have Against The Drug Crisis In The Workplace

A. Employers Are Turning To Drug Testing

In an effort to cope with the burgeoning impact of employee drug abuse, employers have turned to urine drug testing. The costs are too high for employers simply to hope that the problem magically will disappear.

According to a recent study by the American Management Association, approximately 50% of the Fortune 100 companies conduct some type of employee and/or applicant drug testing.[40] The Fortune 100 companies collectively employed about 8.5 million people in 1987.[41] Of the companies that test, approximately 90% conduct pre-employment screening, and slightly fewer than 80% test current employees. Testing thus far is most common among companies whose employees use machinery or have particular safety concerns, including manufacturing, mining, utility and transportation companies.[42]

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[39] *CELC's Proposal for Limited Substance Abuse Testing: An Effective Weapon in the Fight Against Substance Abuse in the Workplace*, at 1 (September 1987).

[40] 124 *BNA Labor Relations Reporter* 29, January 12, 1987.

[41] *Employee Drug Testing: Information on Private Sector Programs*, GAO Report GGD-88-32, March 1988 at 2, (hereinafter cited as "GAO Report").

[42] 124 *BNA Labor Relations Reporter* 29, January 12, 1987.

Among the companies that have been reported to engage in some form of drug testing are such large and prominent employers as Arco,[43] AT&T,[44] Boeing,[45] Capital Cities/ABC,[46] Chase Manhattan,[47] Citicorp,[48] Dow Chemical,[49] Dupont,[50] General Electric,[51] IBM,[52] KerrMcGee,[53] Kodak,[54] McDonnell Douglas,[55] Monsanto,[56] Phillips Petroleum,[57] Proctor & Gamble,[58] Safeway,[59] Shell Oil,[60] Texas Instruments,[61] Union Carbide,[62] Unocal,[63] and Weyerhaeuser.[64] Companies with testing programs in California include Chevron, Pacific Gas & Electric, Greyhound Transportation, Southern California Edison,

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[43] *Chemical and Engineering News*, August 3, 1987, at 9.

[44] *California Business*, November 1986; *Cincinnati Enquirer*, December 22, 1986, at B-1.

[45] *Seattle Times*, January 10, 1988, at B-1. *Akron Beacon Journal*, November 8, 1987.

[46] *New York Times*, July 10, 1987, at C-36.

[47] *American Banker*, January 13, 1988.

[48] *Id.*

[49] *Chemical and Engineering News*, August 3, 1987, at 9.

[50] *Id.*

[51] *Id.*; *Cincinnati Enquirer*, December 22, 1986, at B-1.

[52] *San Jose Morning News*, December 7, 1986, at 1B.

[53] *Nevada Business Monthly*, August 1987.

[54] *Sales and Marketing Management*, March 1987.

[55] *St. Louis Post Dispatch*, August 27, 1987.

[56] *Id.*; *Chemical and Engineering News*, August 3, 1987, at 9.

[57] *Chemical and Engineering News*, August 3, 1987, at 9.

[58] *Cincinnati Enquirer*, December 22, 1986, at B-1.

[59] *Seattle Times*, January 10, 1988, at B-1.

[60] *Chemical and Engineering News*, August 3, 1987, at 9.

[61] *Austin Business Journal*, February 8, 1987, at 1.

[62] *Charleston (West Virginia) Gazette*, April 21, 1987, at 1C. *Chemical and Engineering News*, August 3, 1987, at 9.

[63] *California Business*, November 1986.

[64] *Seattle Times*, January 10, 1988.

Lockheed, Mobil, Southern Pacific, Pacific Bell, and the Los Angeles Times.[65]

When the GAO collected surveys of private employers, it found not only that roughly half the respondents from the nation's largest companies had drug testing programs, but also that "a number of firms that were not testing at the time of the survey were planning to drug test."[66]

B. Properly Done, Drug Testing Is Virtually 100 Percent Accurate

When an initial screening test such as EMIT (enzyme multiplied immunoassay technique) is followed up by a confirmatory test such as GC/MS (gas chromatography/mass spectrometry) the confirmed results are — as the Fifth Circuit found in the case at bar — "almost always accurate, assuming proper storage, handling, and measurement techniques."[67] Any rational concerns about false positive results are eliminated if reliable screen-and-confirm procedures are followed, as they were here, and as they are called for in the new Department of Health

[65] *Los Angeles Times*, October 26, 27, 28, and 30, 1986, at I-1, and October 29, 1987, at I-10.

[66] GAO Report at 20. Employers' turn toward drug testing is widely accepted by the public. According to a nationwide poll conducted by the *New York Times*, a majority of employees support drug testing. *New York Times*, September 2, 1986, at A-1. Nearly three-fourths of all full-time workers, according to the *New York Times* poll, would be willing to take a drug test, and 51 percent believe drug use would be decreased "a great deal" by drug testing. *New York Times*, September 2, 1986, at A-1.

[67] *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 181 (5th Cir. 1987).

and Human Services' "Mandatory Guidelines for Federal Workplace Drug Testing Programs"[68]

The commonly used first screening test, EMIT, has been found by one district court to be "accurate for 97 to 99% of the samples tested, although Syva, the manufacturer, represents conservatively that the test is accurate 95% of the time." *National Federation of Federal Employees v. Weinberger*, 640 F.Supp. 642, 647 (D.D.C. 1986), *rev'd on other grounds*, 818 F.2d 935 (D.C. Cir. 1987). Another test commonly used for initial screening, the radio-immunoassay (RIA) test, is also highly accurate.[69]

In contrast to initial screening tests such as EMIT and RIA, the confirmatory GC/MS test identifies the specific substance used. It has been found repeatedly to be "virtually 100% accurate."[70] According to the court in *National Federation of Federal Employees v. Weinberger*, *supra*, 640 F.Supp. at 648, "The GC/MS procedure has been recognized as the 'state-of-the-art method' of confirmation, and has been accepted by the scientific community as being the most reliable and acceptable method for drug metabolite identification."

The drug testing methodology that the Government utilized in the instant case represents the ideal. From close observation of the sample collection in a restroom, through "elaborate" chain-of-custody procedures, to state-of-the-art

[68] Federal Register, Vol. 53, No. 69 at 11970 (April 11, 1988).

[69] Based on the high degree of accuracy of RIA, the Department of Defense has selected RIA for all of its drug screening. M.M. Abercrombie and J. Jewell, "Evaluation of EMIT and RIA High-Volume Test Procedures for THC Metabolites In the Urine Utilizing GC/MS Confirmation", 10 *J. Anal. Toxicol.* 178 (September/October 1986).

[70] In addition to the Fifth Circuit's decision herein, see *AFGE v. Weinberger*, C.V. 486-353 (S.D. Ga. Dec. 2, 1986); *Lovvorn v. City of Chattanooga*, 647 F.Supp. 875, 878 (E.D. Tenn. 1986).

testing and confirmation (including a quality assurance program), the Government did everything optimally, as the Fifth Circuit recognized. *Von Raab, supra* n. 67, 816 F.2d at 177-78, 181-82. The Government's extreme care should certainly allay any Fourth Amendment concerns about the procedures used here.[71]

While the optimal conditions that obtained here may well serve as a model for others, CELC believes it important to point out that optimal conditions are not always attainable. There are employers whose resources, location, and other circumstances do not permit every part of the Government's methodology here to be employed. The CELC therefore respectfully suggests that, while the methods used here certainly pass constitutional muster, they should not be held to establish a floor or minimum standard. Questions of minimum standards in drug testing are not presented by the Government's superb methodology in the instant case, but should properly be left for future adjudication.

C. A Requirement Of Individualized Suspicion Would Be Totally Unworkable

It has been argued that drug testing is not necessary at all, or should be used only to confirm individualized suspicion, because trained supervisors can detect employees who are under the influence of drugs. Unfortunately, this is simply not true. Illicit drugs do not necessarily have the same obvious effects as alcohol, and yet judgment and

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[71] The criticism that the Government's testing would catch more drug users if it were conducted without any prior notice is, to say the least, curious. A no-notice testing program undoubtedly would have pleased Petitioners and their supporters even less.

performance can nevertheless be severely impaired. The Eighth Circuit recently articulated this fact very cogently:

> "The drunken employee may exhibit the odor of alcohol on his breath, may have slurred speech or a stumbling gait. . . . But the use or abuse of marijuana and other illegal drugs frequently does not produce an externally obvious state of impairment. The intoxicating effect of these substances is said to be primarily mental or emotional; a user's judgment or clear-headedness may be impaired without any obvious physical sign of intoxication. It is the insidious nature of these substances that too often the user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene.[72]

A similar finding was made more recently by a district court in Pennsylvania. Stated the court in upholding random drug testing of transit company employees, "Reliance on suspicion testing appears, therefore, to be inadequate. Many drugs have delayed, residual or chronic effects not ascertainable through behavioral observation." *Transport Workers' Union of Philadelphia Local 234 v. Southeastern Pennsylvania Transportation Authority*, 678 F.Supp. 543, 550 (E.D. Pa. 1988). The Stanford study of aircraft pilot performance discussed above,[73] in which one pilot missed the runway entirely in a simulated landing the day after smoking marijuana, illustrates that employees can suffer from serious — and potentially fatal — performance

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[72] *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co.*, 802 F.2d 1016, 1020 (8th Cir. 1986).

[73] Yesavage, et al., *supra* n. 32.

deficiencies without appearing in any way acutely intoxicated.

The Federal Railroad Administration ("FRA") has just announced plans to supplement its reasonable cause program with random drug testing because its "reasonable cause" program failed to control drug abuse. Stated the FRA:

> "The success of a reasonable cause testing program — both in detection and deterrence — depends on the extent to which the drug choice produces noticeable manifestations of impairment or results in an on-the-job event that falls squarely within the regulatory criteria for testing. Unfortunately, the symptoms of drug use are often undetectable even by a reasonably trained supervisor. Further, some 'functional' drug users seem able to avoid job-related problems until their problems reach a crisis stage. There is, in short, a category of cases in which drug use in violation of the Federal rule will not trigger the testing mechanism provided in current law short of a major compromise in safety that could have catastrophic consequences."[74]

In addition to the inability of trained supervisors to detect the often-subtle manifestations of drug impairment, there are two additional problems with relying on supervision's individualized suspicion.

First, many employees, by the very nature of their jobs, are not closely supervised. The court in *Transport Workers Union of Philadelphia Local 234, supra*, noted, "Numerous [transit company] employees operate without close supervision. Even obvious impairment can go undetected." 678 at

[74] Federal Register, Vol. 53, No. 90, at 16640 (May 10, 1988).

550. In promulgating its new random testing rules, the FRA observed:

> "[A] reasonable suspicion rule can be defeated by procedures as simple as reporting for work unimpaired, then consuming controlled substances in the workplace. The engineer of the Conrail movement at fault in the Chase, Maryland, accident recently testified that use of the reasonable suspicion standard would not have detected any problem with his behavior on reporting for duty. In that case, the engineer and front brakeman used marijuana after departing the terminal."[75]

The FRA concluded, "The threat [from drugs] flows from the aftereffects, chronic effects, and withdrawal effects of these substances, as well as the more heavily-researched acute effects."[76]

Second, even if it could be assumed that employees would always be under the watchful eye of supervisors who are competent to discern drug impairment, it has been the experience of CELC's member companies that supervisors are loathe to single anyone out based on subjective indications of possible drug use. In today's litigious environment, there is an understandable reluctance on the part of first-line supervisors to shoulder the burden of fingering an employee for suspicion of drugs. Does an employee wear dark glasses to work because he wants to hide dilated pupils, or is that just his "personal style"? Does an employee wear long-sleeved shirts in summer to hide needle marks, or is he just a more formal dresser than others? Is an employee's seemingly odd behavior due to

[75] Federal Register Vol. 53, No. 90, at 16640 (May 10, 1988).
[76] *Id.* at 16644.

drug use, or to a domestic squabble at home, or just an offbeat temperament?

Solicitude for privacy and individual autonomy makes a requirement of individualized suspicion less workable in today's workplace, not more. It is ironic that Petitioners and their supporters herein, who claim to be defending expectations of privacy, would force employers to rely on subjective judgments in deciding which employees to accuse of drug use. Subjective criteria in the making of employment decisions are a breeding ground for litigation and accusations, whether justified or not, of discriminatory treatment.[77] Furthermore, accusations of drug use in particular have given rise to tort actions by accused employees against their employers.[78]

In sum, while CELC certainly believes employers should be allowed to test based on reasonable suspicion, testing should not be so limited as a matter of law.

D. Drug Testing Works

The experiences of CELC member companies and others strongly indicate that drug testing works to reduce or deter drug use, increase productivity, and decrease accidents. Most employers surveyed found that when applicant

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[77] *See, e.g., Davis v. Califano*, 613 F.2d 957, 965-66 (D.C. 1979), citing *Moller v. U.S. Steel Corp.*, 509 F.2d 923, 927-28 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975) (subjective determinations deemed likely to "encourage and foster" or at least "offer a convenient pretext for" discrimination); *Stallings v. Container Corp.*, 75 FRD 511, 521 (D. Del. 1977) (subjectivity "leaving ample room for the exercise of . . . bias").

[78] *See e.g., Tellez v. Pacific Gas & Elec. Co.*, 817 F.2d 536 (9th Cir.) *cert. denied*, 108 S.Ct. 251 (1987) (defamation and infliction of emotional distress claims brought against employer for accusing employee of buying cocaine at work; summary judgment for employer reversed).

testing[79] was first initiated, 12 to 20 percent of job applicants tested positive for illegal drugs.[80] Figures as high as 45 percent were reported.[81] After a testing program was instituted, however, fewer applicants tested positive. For example, since drug testing began, the percentage of job applicants testing positive declined from 22 percent to 6 percent at Southern Pacific, from 21 percent to 15 percent at Lockheed, from 28 percent to 15 percent at Southern California Edison, from 11 percent to 9 percent at Pacific Gas and Electric, and from 13 percent to 9 percent at the Los Angeles Times.[82]

Drug testing has also had a positive effect on increasing productivity and decreasing accidents. After two years of drug testing, Southern Pacific reported that the number of accidents caused by "human factors" decreased by over 60 percent, and the number of injuries caused by lost work time declined by 24 percent.[83] Pacific Gas and Electric reported a 25 percent reduction in accidents and a 40 percent decline in serious injuries after instituting applicant testing.[84]

Perhaps the most dramatic evidence of the substantial benefits of drug testing comes from the United States armed forces. In the Navy, in 1980, 47 percent of those tested who were under 25 years of age showed positive for drug use. In

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[79] CELC recognizes that new employee applicant testing is not before the Court. Since applicant testing deters drug users from applying for hire, testing candidates for promotion to sensitive positions, which is before the Court, logically would have the same deterrent effect.

[80] *Wall Street Journal*, August 8, 1985, at 8; *Los Angeles Times*, July 27, 1985, at I-1.

[81] *Los Angeles Times*, July 27, 1985, at I-1.

[82] *Los Angeles Times*, October 29, 1986, at I-10; 122 *BNA Labor Relations Reporter* 126 (June 23, 1986).

[83] *Los Angeles Times*, October 29, 1986, at I-10.

[84] *Id.*

the ne.t four years, after drug testing was begun in 1981, positive drug tests dropped to just 4 percent. Likewise, the Army reported that the percentage of positive tests has declined 50 percent since testing was begun in 1982. With the advent of drug testing, productivity loss in the armed services declined from 9.9 percent in 1982 to 3.4 percent in 1985. The rates of lost time and energy in the military due to accidents and illness declined from 1.1 percent in 1982 to .4 percent in 1985.[85]

Thus, the experience of many employers strongly supports the implementation of drug testing. Although drug testing is not a cure-all for the pervasive societal problem of drug abuse, it certainly is highly successful in deterring substance abuse and in limiting its devastating effects in the workplace.

III. Drug Testing Does Not Unduly Intrude Upon Employee Privacy

Petitioners and their supporters go on at some length to decry the invasion of privacy entailed in being required to urinate for drug testing. The AFL-CIO even raises the psychological significance of urination according to Freud (AFL-CIO Amicus Brief, p. 9).

On a more mundane level than Freud, any adult who has ever had a routine physical examination has provided a urine sample to test for diabetes and other ailments. No one seriously questions that employers have the right to require physical examinations, including urinalysis, to determine

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[85] *Los Angeles Times*, October 29, 1986, at I-33.

fitness for employment.[86] An employment physical may entail not only urinating for purposes of routine urinalysis, but also disrobing and being poked, probed, and otherwise closely scrutinized. Most adults treat employment physicals matter-of-factly, without the heightened sensitivity that is claimed on behalf of Petitioners here.

Given that urine samples are commonly provided as part of routine employment physicals, the question of intrusiveness arises not so much from obtaining the sample, but from how the sample is tested. The gravamen of the privacy argument against drug testing is that employers have no business learning whether their employees take illicit drugs "off duty". Petitioners protest that drug testing allows "employers to monitor conduct of employees that occurs during their off-duty hours." (Petitioners' Brief, p. 30). The AFL-CIO and the ACLU make similar arguments in their amicus briefs. (AFL-CIO Amicus Brief, p. 11; ACLU Amicus Brief, p. 23).

It is true that current drug testing method technology does not allow accurate determination of exactly when drugs were taken or the degree of present impairment. In the real world, however, drug abuse does not politely confine itself and its effects to "off-duty" hours. As has been amply demonstrated herein,[87] drug abuse has invaded the workplace in force.

In order to determine fitness for work, an employer needs to know whether an employee is taking cocaine at least as much as the employer needs to know about diabetes or back problems. The employee, of course, has no legitimate

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[86] *Cf. Garrett v. Los Angeles City Unified School District*, 116 Cal.App.3d 472, 479 (1981) (school teacher's privacy not invaded by mandatory chest x-ray for tuberculosis, which teacher characterized as "being required tc undergo a 'fishing expedition' of her body").

[87] See Part I, *supra*.

privacy interest in taking cocaine, whether off-duty or otherwise. *See United States v. Jacobsen*, 466 U.S. 109, 123 (1984). Thus, for an employer to determine through drug testing that an employee is taking cocaine no more intrudes on the employee's privacy than any other revelation of medical condition that is necessary to determine the employee's fitness for work.

CONCLUSION

Drug abuse by employees is a devastatingly serious problem; the only practical employer response is urine drug testing, which does not unduly intrude upon employee privacy. For all the reasons stated herein, the decision of the Fifth Circuit below should be affirmed.

Date: June 17, 1988

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Petitioners,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

With the written consent of the parties,[1] the Chamber of Commerce of The United States of America (the "Chamber") respectfully submits this brief *amicus curiae* in support of Respondent. The Chamber is the largest federation of business, trade and professional organizations in the United States, with approximately 180,000 members, consisting of state and local chambers

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[1] The consent letters have been filed with the Clerk of this Court.

of commerce and trade and professional organizations. The Chamber's members employ approximately 22,817,000 persons. The Chamber has regularly represented the interests of its member-employers in important employment and labor relations matters before this Court by filing briefs *amicus curiae* in such cases as *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, —— U.S. ——, 108 S.Ct. 830 (1988); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); and *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979).

The members of the Chamber are committed to reducing the impact of drug abuse [2] in the workplace for reasons of safety, health, quality, productivity, and cost. The Chamber recognizes that the issue of drug testing in the workplace—whether pre-employment or for existing employees—raises serious legal and ethical concerns. Cognizant of these concerns, but aware of the increasing harm caused by drug abuse, a substantial and increasing number of American businesses have established drug abuse programs that seek to balance fairly the employer interests advanced by such programs with the rights and sensibilities of their employees. An important element of these programs is urinalysis drug testing.[3]

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[2] As used in this brief, the term "drug abuse" will mean use of illegal drugs and/or use of controlled substances not authorized by a licensed medical practitioner or taken in quantities or for periods that exceed legal prescription. Alcohol can be considered a drug because its main ingredient—ethanol—acts as a central nervous system depressant. M. Gold, *The Facts about Drugs and Alcohol* (1986). Although alcohol abuse is also an important problem, it is considered a separate issue by most businesses because alcohol is a legal substance and because of testing differences.

[3] Companies with drug testing programs for job applicants and/or employees include: Unocal, IBM, Kodak, DuPont, *The New York Times*, the American Broadcasting Company/Capital Cities, General Motors, United Airlines, USAir, Lockheed, and General Electric Company. M. de Bernardo, ***Drug Abuse in the Workplace:***

While the present case involves urinalysis drug testing by a *government* employer, and so presumably will be decided under the Fourth Amendment, it nonetheless has great significance for private employers. At least ten states have explicit privacy guarantees in their constitutions, some of which may protect only against governmental intrusions, but others of which may apply to intrusions by private entities as well.[4] And some states have statutes which either allow an individual to proceed against a private corporation for an interference with his Fourth Amendment rights under the Constitution, or which directly confer privacy rights enforceable against

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An Employer's Guide for Prevention 31 (1987) (hereafter ***Drug Abuse in the Workplace***).

In 1987, it was estimated that about 30% of the Fortune 500 companies were giving urinalysis drug tests to job applicants and that about 26% were testing employees. Imwinkelried, *Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Private Employee Urinalysis Testing*, Clinical Chemistry, Oct. 1987, at 11B, 19B (hereafter "Imwinkelried"). A survey completed in April, 1988 found that 28% of all companies nationwide with more than 5,000 employees have a drug testing program and that 10% of all companies with 500 to 1,500 employees have such programs. The Gallup Organization, *Drug Testing at Work: A Survey of American Corporations* 3 (1988) (hereafter "Gallup Survey"). *See also* Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. Pitt. L. Rev. 201, 202 (1986) (hereafter "Miller"); *Bureau of National Affairs Special Report—Alcohol and Drugs in the Work Place: Cost, Controls and Controversies* 27 (1986).

[4] McGovern, *Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 Stan. L. Rev. 1453, 1466 and notes 60 & 61 (1987) (hereafter "McGovern"). *See also* Scanlan, *Playing the Drug Testing Game: College Athletes, Regulatory Institutions, and the Structures of Constitutional Argument*, 62 Indiana L.J. 863, 913 note 188 (1987) (at least eleven states have explicit privacy guarantees in their constitutions); Comment, *Corporate Drug Testing: Private Employers' Right To Test*, 12 Del. J. Corp. L. 951, 977 & note 171 (1987) (nine states have express constitutional provisions that refer to a right of privacy).

such private corporations.[5] In all those jurisdictions, challenges to drug testing programs by employees of private corporations will be strongly influenced by the result and reasoning of the Court's decision in this case, especially by the balance this Court strikes between the interests promoted by testing and the privacy interests of employees.[6]

An understanding of the nature of drug testing now common in the private sector may aid the Court in considering the instant case.[7] For this reason, the Chamber will describe the wide variety of urinalysis drug testing programs initiated by American business and the public safety and other important employer interests that justify such programs.

[5] *See, e.g., Bally v. Northeastern University*, Civ. No. 87-1178 (Mass. Super. Ct. Nov. 1987) (construing Mass. Civil Rights Statute, Gen. Laws ch. 12, Section 111 & ch. 214, Section 1B).

[6] This decision may also have important federal law consequences for private employers. Thus, for example, the Ninth Circuit recently held that it cannot be assumed, in the absence of express contractual provisions authorizing urine testing, that private railway workers would grant their employer authority to invade their privacy in ways the government could not. *Brotherhood of Locomotive Engineers v. Burlington Northern R.R. Co.*, 838 F.2d 1087, 1093 (1988), *petition for cert. filed*, 56 U.S.L.W. 3720 (U.S. Apr. 1, 1988) (No. 86-1631) (challenge to a private railroad's urinalysis drug testing program under the Railway Labor Act, 45 U.S.C. Section 151 *et seq.*). This ruling has thrown into confusion private employers' long-standing assumption that they may require job applicants and employees to undergo drug testing without federal constitutional limitations. Although the indirect consequences of the Court's decision in the instant case cannot be avoided, this case must, of course, be decided solely under the Fourth Amendment, leaving the complex federal Railway Labor Act issues of *Burlington Northern* to the appropriate time.

[7] While the question of the legality of urinalysis drug tests in the employment context is being addressed by the Court for the first time in the present case, in its most recent decision concerning a workplace search, it was suggested that the reasonableness of a workplace search under the Fourth Amendment may depend in part upon whether searches of the same sort "are regarded as reasonable and normal in the private-employer context." *O'Connor v. Ortega*, 480 U.S. ——, 94 L.Ed.2d 714, 733 (1987) (Scalia, J. concurring).

BACKGROUND

1. Drug Abuse in the Workplace Causes Major Problems for American Industry.

A recent study revealed that 36.8 million people (19% of the household population aged 12 years and older) have tried marijuana, cocaine, or other illicit drugs at least once in the past year and 23 million people (12%) at least once during the month prior to being surveyed.[8]

Not surprisingly, studies show that the incidence of drug use by private sector employees mirrors the incidence in society generally. Experts estimate that between ten percent and 23 percent of all U.S. workers use dangerous drugs on the job.[9] Another recent survey conducted for the federal government found that among employed 20-40 year olds, 29% reported use of an illicit drug the previous year, while 19% reported illicit drug use in the month prior to being surveyed.[10]

[8] National Institute on Drug Abuse, *National Household Survey on Drug Abuse: Population Estimates 1985* 54 (1987) (hereafter "Household Survey"). "Illicit drug use" was defined by the researchers conducting this study to include the nonmedical use of the psychotherapeutic drugs, marijuana, cocaine, inhalants, hallucinogens, PCP, stimulants, sedatives, tranquilizers, analgesics, and heroin. *Id.* at 5. *See also* Schuster, *The United States' Drug Abuse Scene: An Overview*, Clinical Chemistry, Oct. 1987, at 7B.

[9] National Institute on Drug Abuse, *Strategic Planning for Workplace Drug Abuse Programs* 4 (1987) (hereafter *Strategic Planning*). An American Management Association survey showed that one in ten blue and white collar workers used illicit drugs in the workplace. J. Walsh & S. Yohay, *Drug and Alcohol Abuse In the Workplace* 4 (1987).

[10] National Institute on Drug Abuse, *NIDA Capsules* (Aug. 1987) (Issued by NIDA Press Office). In a recent survey, two-

The annual cost of drug abuse to American industry has been estimated to be in excess of $25 billion per year.[11] This estimate reflects reduced productivity and lost employment.[12] It has been estimated that, compared with drug-free employees, drug-abusing employees are 3.6 times more likely to be involved in plant accidents; two and one-half times more likely to be absent from work for more than eight days; five times more likely to file workers' compensation claims; and up to three times more likely to use sick benefits.[13]

In addition to these costs, there are additional substantial, but difficult to calculate costs of worker drug abuse such as lower morale, decreased quality of products or services, destruction of or damage to company property, higher insurance rates, and increased workplace theft and embezzlement to pay for drug habits.[14]

2. Different Types Of Drug Testing Programs Are Being Used By American Businesses To Accomplish Different Goals.

Urinalysis drug testing, as used by American businesses, takes many different forms, including routine

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thirds of large companies with drug testing programs indicated they had had to deal with incidents of drug abuse among their employees in the past year. Gallup Survey, *supra* note 3, at 9.

[11] National Institute on Alcohol Abuse and Alcoholism, *Alcoholism and Health: Sixth Special Report to Congress on Alcohol and Health* 22 (Jan. 1987) (total cost to society of drug abuse is $46.9 billion/year, of which $26 billion is cost to industry) (figures adapted from Research Triangle Institute, *Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness: 1980* (June 1984) (hereafter "Research Triangle Study"); Miller, *supra* note 3, at 203 & note 5 (citing Stille, *Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, National Law Journal, Apr. 7, 1986 at 1, col. 2.).

[12] Research Triangle Study, *supra* note 11, at 4.

[13] *Strategic Planning*, *supra* note 9, at 4.

[14] *See Drug Abuse in the Workplace*, *supra* note 3, at 9-10.

drug screening of all job applicants; regularly scheduled, periodic testing of employees; a pre-announced program of random testing; post-treatment testing; post-accident testing; and "for cause" testing.[15]

A number of different employer interests, separately or in combination, justify these different kinds of testing programs. These interests include promoting employee health; protecting employee and/or public safety; protecting national security; reducing employer tort liability as a result of safety violations; promoting efficiency and productivity in the workplace; promoting quality work; and (for government agency employers) promoting public confidence in the integrity of the agency.

Where employer interests in promoting safety—and especially public safety—are involved, employers may seek to promote these interests through "for cause" testing triggered either by the occurrence of an accident or by a particularized suspicion of a supervisor that an employee has drugs in his or her system. Alternatively, employers may seek to promote compelling safety interests through automatic or random testing of all employees or of designated groups of employees in businesses or activities raising special safety concerns. "For cause" testing occurs after the fact—after the employer has an indication that the employee has been impaired on duty. In contrast, random testing serves a deterrent or preventive function. The rationale for this kind of testing is that detecting drug abuse by other means is very diffi-

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[15] *Drug Abuse in the Workplace*, *supra* note 14, at 39-43. "Among the large companies which test only some of their employees, 43% test employees who show cause. One in five (20%) test drivers, one in eight (12%) test employees randomly while one in ten (10%) test employees in security-sensitive positions." Gallup Survey, *supra* note 3, at 37.

cult and that employers should not have to wait to test employees for drug abuse until after a workplace tragedy has occurred.[16]

3. Government And Business Drug Testing Programs Are Widespread And Have Proved To Be Effective In Reducing Employee Drug Abuse.

Urinalysis drug testing on a large scale was initiated by the military in 1981, and is now being conducted by approximately one-third of all Fortune 500 companies.[17] Drug tests were administered to almost five million Americans in 1986.[18]

Studies have demonstrated that government and corporate drug testing programs can control employee drug abuse. For example, in 1980, before the United States Navy began random urinalysis testing, drug abuse among Navy members was at 33%. A year after the testing

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[16] *See infra* note 40. Drug testing, of course, is only one component of programs initiated by employers to address drug abuse problems. Employee education, assistance for employees who recognize the need for help, and management training have also become important tools to address such abuse.

In most companies, the consequence of a positive test result for employees is referral for counselling or rehabilitation. Among companies which test only employees, 78% refer the individual to counselling or rehabilitation. Gallup Survey, *supra* note 3, at 5.

Job applicants are not usually offered rehabilitation. Among those companies which only test job applicants, 86% say that applicants testing positive are not hired, although 12% say that they refer the applicant to counseling or rehabilitation. *Id.*

[17] *See supra* note 3.

[18] Comment, *Corporate Drug Testing: Private Employer's Right to Test*, 12 Del. J. Corp. L., 951, 964 & note 77 (1987) (citing Stille, *supra* note 11, at 1, col. 1).

programs were instituted in 1981, this figure had dropped to 16.2%. By 1985, use was down to 10.3%.[19]

Studies also have shown that private sector drug testing programs reduce the number of employee accidents while increasing worker productivity. For example, after the Georgia Power Company implemented a drug testing program, the number of accidents decreased from 5.4 injuries per 200,000 worker hours to less than 0.5 per 200,000 worker hours.[20] Southern Pacific Railroad had similar results with its program, reporting a 71 percent drop in on-the-job accidents and injuries due to human-related error as compared to the previous year.[21]

4. Properly Conducted Urinalysis Drug Tests Can Very Accurately Determine Employee Drug Abuse.

By using a relatively inexpensive test for the initial screening and a second, more expensive test to confirm initial positive results, employers can very accurately determine whether an employee has recently used drugs.[22] Corporate drug testing programs often use the enzyme multiplied immunoassay technique (EMIT) test for the initial screening. This test uses antibodies to detect eight broad classes of abused drugs (such as opiates or barbiturates or amphetamines) rather than a single drug. In the test mixture (reagent) designed to detect

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[19] Research Triangle Institute, *1985 Worldwide Survey of Alcohol and Nonmedical Drug Use Among Military Personnel* 50 (June 1986).

[20] Angarola, *Mandatory Drug Testing in the Workplace: Protect Safety, Not Drug Abuse*, A.B.A.J., Aug. 1986, at 35.

[21] *Id. See also* Miller, *supra* note 3, at 204 ("At least two case studies of particular corporations have concluded that employee assistance programs incorporating urinalysis testing enhanced job efficiency and markedly reduced sickness, disability, and accident rates.").

[22] National Institute on Drug Abuse, *Employee Drug Screening* 4-5 (1986) (hereafter *Employee Drug Screening*); *see also infra* note 26.

a certain drug class, antibodies attach themselves to drugs of such class if they are present in the urine. In the EMIT test, the reaction causes a color change which can be measured by a device called a spectrophotometer.[23] Because drug screens such as the EMIT test can produce false-positive results, a sound drug testing program requires that a positive EMIT finding not be used as conclusive evidence of drug use.[24] Instead, after receiving a positive result on an EMIT screen, the employer should do confirmatory testing on the same urine sample by gas chromatography/mass spectrometry (GC/MS) procedures.[25] Properly conducted, the GC/MS tests accurately will identify a single chemical compound, and are as foolproof as a fingerprint. When a reputable, quality laboratory conducts confirmatory GC/MS testing, there are virtually no false positives.[26]

While the accuracy of EMIT and GC/MS for measuring metabolites of illegal drugs cannot seriously be disputed, the Chamber recognizes that a positive urine test, even when accurate, indicates only that the subject ingested the drug at some time in the relatively recent past.[27] Accordingly, urinalysis drug tests alone cannot determine to what extent the employee is or was impaired by the illicit drug at a particular time.[28] But this limi-

[23] L. Dogoloff & R. Angarola, *Urine Testing in the Workplace* 20-21 (American Council for Drug Education 1985) (hereafter "Dogoloff").

[24] *See generally id.* at 21-22.

[25] More than 80% of large companies with drug testing programs use a confirmatory test. Gallup Survey, *supra* note 3, at 56.

Gas chromatography involves heating and vaporizing a liquid sample while it moves through a column of absorbent material. Individual compounds are separated on this column according to their chemical and physical properties. These separate compounds appear as peaks on a graph and can be identified.

Although GC can be used alone to perform confirmation tests, the preferred method combines it with a mass spectrometer. The two instruments together are more powerful than either instrument alone. The GC/MS further breaks down the compound molecules into electrically charged ion fragments which can be matched up with the known patterns of abused drugs, allowing positive identification to be made.

Although the GC/MS test is "the state-of-the-art drug testing method currently available, it is not practical to use as a screening method because it is too expensive, requires very sophisticated equipment, and must be performed by highly trained technicians." Accordingly, it is best to use a screening method such as the EMIT test first to eliminate the negatives and then to use GC/MS as a confirmatory test on the samples that initially test positive. Dogoloff, *supra* note 23, at 22. *See also* National Institute on Drug Abuse, *Urine Testing for Drugs of Abuse* 30-42 (1986).

[26] *See, e.g.*, Moyer, Palmen, *et al.*, *Marijuana Testing—How Good is It?*, 62 Mayo Clinic Proc. 413, 417 (1987) (reporting that the EMIT test followed by GC/MS provides "virtually 100% accuracy in the detection of marijuana abuse"); Hanson, *Drug Abuse Testing Programs Gaining Acceptance in the Workplace*, Chem. & Eng. News, June 2, 1986, at 7, 8 (reporting a study conducted by the United States Navy indicating that in 18,000 tests administered during the period from 1982-85, not a single false positive was reported). Errors in drug testing sometimes occur as a result of poor quality control within laboratories. In this regard, the Chamber endorses efforts to ensure that all laboratories performing analysis of drug test data meet high standards of reliability. *See infra* note 30.

[27] This is because the inert drug metabolites which the tests reveal "may appear in urine for several days, even weeks (depending upon the drug). . . ." *Employee Drug Screening*, *supra* note 22, at 4. "Urine specimens positive for cannabinoids, for instance, signify that a person has consumed marijuana or marijuana derivatives from within 1 hour to as much as 3 weeks or more before the specimen was collected. Generally, a single smoking session by a casual user of marijuana will result in subsequently collected urine samples being positive for two to five days. . . ." *Id.* at 10. "The sensitivity of urine assay methods generally available today allows detection of cocaine use for a period of 1-3 days and heroin or phencyclidine (PCP) use for 2-4 days." These detection times might be doubled in cases of previous chronic use. *Id.* at 11.

[28] Dogoloff, *supra* note 23, at 22. New evidence of the lingering effects of marijuana usage, however, suggests that the impairing effects of marijuana use may last well past the time of the subjec-

tation is irrelevant in the context of preventive drug testing programs designed to deter employee drug abuse and to prevent such drug abuse from adversely affecting legitimate employer interests. *See infra.* pp. to .

5. Private Sector Drug Testing Programs Are Being Structured To Protect Legitimate Employee Concerns.

A fair and effective drug testing program should have valid and reliable testing procedures, appropriate protections for the employee subject to testing, and a design that is sensitive to employee privacy interests.

a. *Use of Valid And Reliable Testing Procedures With Employee Protections.* In addition to use of scientifically valid tests, the elements of a successful drug testing procedure include establishment of strict chain of custody controls for the specimen; use of a reliable laboratory; and implementation of forensic quality standards.[29]

In some corporate testing programs, the urine specimen is produced in circumstances that maximize privacy while minimizing the possibility of tampering. As is typical in virtually all physical examinations, the employee urinates in private. The specimen is then handed directly from the donor to a nurse, who immediately seals the specimen in a tamper-proof container, which is identified

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tive "high," calling into question the argument that what employees do with illegal drugs on their own time is "none of the company's business." *See* Yesavage, Leirer, Denari & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 Am. J. Psychiatry 1325-29 (1985) (arguing that marijuana users may have trouble performing "complex behavior and cognitive tasks" or doing work that demands quick reactions for up to twenty-four hours after using the drug).

[29] "Almost all (96%) large companies think accuracy is a very important factor . . . in selecting a lab. Approximately nine in ten think quality control (92%), documentation (90%) and technical expertise (90%) is very important. Slightly less than nine in ten (86%) say the same about chain of custody." Gallup Survey, *supra* note 3, at 65.

and initialed by the employee. The employee also signs a form which will travel with the sample to the laboratory and which will document each person in the chain who takes custody of and responsibility for the sample until the time the laboratory records and reports its test results.

Rigorous forensic standards must be adhered to by the laboratory, including proficiency testing programs. Under such programs, the accuracy of the laboratory's work should be routinely checked by requiring it to perform "blind" analysis of samples having known levels of various drugs.[30]

Drug testing programs might give applicants and employees the opportunity to explain a positive test result. For example, a call to a family physician or pharmacist can quickly corroborate an applicant's or employee's claim that the identified chemical had been prescribed by a physician in medical treatment. Good program design also requires that a portion of all original samples testing positive be frozen and retained for a substantial period of time so that the sample can be retested by a second laboratory if necessary.[31]

b. *Sensitivity to Employee Privacy Interests.* To avoid the need for direct observation of urination, some

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[30] "Almost all (96%) of the large companies with drug testing programs say the lab they are currently using is certified." Gallup Survey, *supra* note 3, at 70.

Mandatory Guidelines for Federal Workplace Drug Testing Programs were published in the *Federal Register* on April 11, 1988. These Guidelines establish comprehensive standards and procedures for all aspects of drug testing, including procedures for collecting urine specimens, the drugs employees may be tested for, and eligibility standards for certifying laboratories engaged in drug testing for Federal agencies. These guidelines provide an important model for private sector testing standards and procedures. 53 Fed. Reg. 11,970 (1988).

[31] *See Drug Abuse in the Workplace*, *supra* note 3, at 22.

corporations arrange for the employee to produce the sample in a room without running water; alternatively, bluing agents can be placed in the toilet tank of a bathroom stall. In addition, many businesses make a point of giving clear notice of their drug testing program and its requirements, and of securing consent from their employees in advance of testing. Intrusion on employee privacy can also be reduced by eliminating employer discretion in the selection of job applicants or employees to be tested.[32] In many corporate pre-employment programs, for example, all applicants are tested as part of the routine pre-employment physical. And in random testing programs of employees in safety-sensitive industries, there is no employer discretion and no stigma attached to a particular employee if a statistically random approach to selection decisions is used. To minimize the intrusion on employee privacy and preserve confidentiality as much as possible, some businesses require that tests be performed in a *medical* setting and that results are provided only to medical personnel, except for managers and supervisors with a direct and immediate need to know.

SUMMARY OF ARGUMENT

Arguably, urinalysis drug tests of government employees are not searches under the Fourth Amendment either because employees lack a reasonable expectation of privacy with respect to such tests or because they have given legally valid consent to such tests. Assuming *arguendo* that such tests *are* searches under the Fourth Amendment, neither warrants nor probable cause are required for such tests to be "reasonable"; rather, a challenged test should be judged by the standard of "reasonableness under all the circumstances." In applying this standard to the facts of a specific case of government urinalysis drug testing, there must be a fair balance between the

[32] Some discretion *is* required, of course, where there is testing based upon individualized suspicion.

interests of employers and employees. One of the factors that must be considered is whether individualized suspicion is required. Other relevant factors include the justification for the test; the integrity of the challenged drug testing program; the scope, manner, and place of the test; and the availability of less intrusive alternatives.

In view of the wide variety of government drug testing programs, the varied employer interests that can justify particular tests, and the many permutations of relevant factors presented, this Court should adopt a "common law" approach to litigation in this area, relying heavily on a careful examination of the specific facts of each case, until clear principles of broader applicability have begun to emerge.

ARGUMENT

Analytically, in reviewing a challenged governmental invasion of privacy under the Fourth Amendment, three broad questions must be addressed: Is the challenged invasion a "search" within the meaning of the Fourth Amendment; if so, what should be the test used to determine whether the search passes constitutional muster; and how does the relevant test apply to the unique facts of a specific case. In this brief, the Chamber will address the second and third of these questions. But before turning to those questions, the Chamber would respectfully note that the issue of whether an alleged invasion of privacy constitutes a search at all is a very important one in the area of workplace urinalysis drug testing. Obviously, where government action is not involved, the Fourth Amendment will ordinarily not be implicated, and it will not be analytically necessary to decide whether a search has occurred. But it is worth considering whether urinalysis drug testing of even government job applicants or employees, at least in certain circumstances, does not constitute a search under Fourth Amend-

ment jurisprudence because it does not intrude upon reasonable expectations of privacy.[33] To the Chamber's knowledge, urinalysis drug tests conducted as part of routine pre-employment medical examinations have never been considered "searches" in the law. And arguably, where employees have been informed well ahead of time and/or it has become common knowledge that employees will be subjected to urinalysis drug testing as a condition of their employment in a particular work setting, the requisite reasonable expectation of privacy no longer exists.[34]

Finally, it is worthy of careful consideration whether government urinalysis drug testing programs are "searches" under the Fourth Amendment if employees have consented ahead of time to such testing. This is a difficult question because the State may not impose conditions that require the relinquishment of a Constitutional right. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Frost v. Railroad Commission*, 271 U.S. 583, 593-94 (1926). But with regard to urine testing specifically, the Third Circuit has found meaningful consent where an individual chooses to remain in a pervasively regulated industry with knowledge that he will be tested for drug use. *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 577 (1986).[35]

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[33] *See, e.g.*, Judge Higginbotham's concurrence in the Fifth Circuit's *per curiam* decision denying a stay in *Von Raab* pending appeal, questioning whether requiring urine specimens from applicants for sensitive positions in the United States Customs Service "is a search . . . at all." *National Treasury Employees Union v. Von Raab*, 808 F.2d 1057, 1061-62 (5th Cir. 1987). *See also* Adams, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 Chi. L. Rev. 1335, 1343-1356 (1987) (hereafter "Adams").

[34] *See infra* pp. 21-22.

[35] In the context of public aid made contingent on visits to a recipient's home, this Court has found the recipient's consent to such visits to be voluntary. *Wyman v. James*, 400 U.S. 309, 317 (1971). And in the analogous contexts of airport and courthouse searches, courts have also found voluntary consent even though individuals were faced with the pressures of loss of economic livelihood or of freedom of movement if they refused to consent. *See, e.g., United States v. Doran*, 482 F.2d 929, 932 (9th Cir. 1973); *McMorris v. Alioto*, 567 F.2d 897, 901 (9th Cir. 1978). *See* Adams, *supra* note 32, at 1352-56.

In a very recent decision, the Ninth Circuit, noting that no court has held to the contrary, has ruled that the state constitutional privacy right to be free from drug testing is one that "can be negotiated away" during collective bargaining. *Utility Workers Local No. 246 v. Southern California Edison Co.*, 56 U.S.L.W. 2656 (9th Cir. May 4, 1988) (Nos. 87-5674, 87-5702).

[36] In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), for example, this Court concluded that the warrant requirement was not applicable to the school environment, because it would unduly interfere with the swift and informal disciplinary procedures needed in schools. And in *O'Conner v. Ortega*, 480 U.S. ——, 94 L.Ed.2d 714,

I. URINALYSIS DRUG TESTING OF GOVERNMENT EMPLOYEES SHOULD BE JUDGED BY THE STANDARD OF "REASONABLENESS UNDER ALL THE CIRCUMSTANCES."

A. The Fourth Amendment Does Not Require a Warrant and Probable Cause, or Even Reasonable Suspicion, for Urinalysis Drug Testing of Government Employees.

Assuming *arguendo* that urinalysis drug tests are searches, a warrant and probable cause (or even reasonable suspicion in certain circumstances) should not be required for such searches of government employees to be considered reasonable and constitutional. Although the traditional standard of reasonableness for a government search is compliance with the Fourth Amendment's warrant and probable cause requirements, this Court has previously held that a warrant may not be required when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967).[36]

Requiring employers to obtain a warrant whenever they wish to administer a urine drug test would be disruptive and unreasonable because such tests are not given for the purpose of investigating the violation of criminal laws[37] and because such "work-related searches are merely incident to the primary business of the agency." *O'Connor v. Ortega*, 480 U.S. ——, 94 L.Ed.2d 714, 726 (1987) (plurality decision). "[T]he imposition of a warrant requirement would conflict with "the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *Ortega*, 94 L.Ed.2d at 726 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

The requirement of probable cause is also inappropriate in the circumstances of employment urinalysis drug testing programs. Noting that public employees often "are entrusted with tremendous responsibility," that "the consequences of [employee] misconduct or incompetence to both the agency and the public interest can be severe," and that "public employers are not enforcers of the criminal law," the *Ortega* plurality found that a probable cause requirement for either of the two kinds of searches at issue in that case "would impose intolerable burdens." *Ortega*, 94 L.Ed.2d at 727.[38] The

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726 (1987) (plurality decision), this Court held that warrants would not be required in the context of public employer searches of employees' offices because obtaining such warrants would be "unworkable" and "unduly burdensome."

[37] In the Customs Service program, employees who test positive risk losing their jobs. However, in most corporate drug testing programs, employees testing positive, at least in the first instance, are given the opportunity to participate in a carefully designed rehabilitation program at company expense. *See supra* note 16.

[38] For the same reasons probable cause is not an essential element of reasonableness for every search, individualized suspicion is *not* an essential element of reasonableness for every urinalysis drug test. Rather, as argued at pages 23-25, *infra*, whether individualized suspicion is required in the circumstances of a particular case is one of the factors that should be considered under a reasonableness test. Because one of the private sector's great concerns is to be able to conduct a carefully designed, *public-safety-based*, preventive drug testing program and because the requirement of individualized suspicion would completely frustrate the purposes of such a program, the Court should either make clear that individualized suspicion does not apply to such a program or else avoid deciding that issue until a Fourth Amendment challenge to such a program comes before it.

same analysis applies with equal force to workplace urinalysis drug tests. In addition, because "workers on drugs like cocaine often can maintain an appearance of normality even while using heavily,"[39] it is unrealistic to expect supervisors to make probable cause determinations concerning such drug use. And finally, automatically requiring probable cause as a prerequisite for urinalysis drug testing would undermine the essential preventive purpose of such testing in the employment context because by the time drug abuse manifests itself, compelling employer interests may already have been irreparably compromised.[40]

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[39] *Strategic Planning, supra* note 8, at 6. "As with alcohol, detection is made much more difficult by the worker's active efforts to conceal and deny his/her problem—and by the frequent complicity of coworkers in shielding the person with the problem." *Id.*

[40] In a recent notice of proposed rule-making, the Federal Railroad Administration noted that "[u]nfortunately, the symptoms of drug use are often undetectable by even a reasonably trained supervisor." With random testing, "detection is accomplished prior to the time when the safety risk associated with drug use becomes manifest in a potentially life-threatening event." 53 Fed. Reg. 16,640 (1988) (to be codified at 49 C.F.R. pts. 217 & 219) (proposed May 10, 1988). *See also* McGovern, *supra* note 4, at 1498-99 (The chief benefit of urinalysis drug tests "is that they can detect the use of drugs before visible symptoms of drug abuse show themselves in the workplace. This ability is an advantage no trained supervisor can duplicate."); *Strategic Planning, supra* note 8, at 6 ("By the time supervisors recognize these more subtle signs, great damage may already have been done.").

B. For Both Precedential and Policy Reasons, Government Urinalysis Drug Testing Should be Judged by the Standard of "Reasonableness Under All the Circumstances."

Having determined that in the two special circumstances of work-related, noninvestigatory intrusions and investigations of work-related misconduct, the warrant and probable cause requirements were impractical, the plurality in *Ortega* held that intrusions on the constitutionally-protected privacy interests of government employees should be judged by the standard of "reasonableness under all the circumstances." 94 L.Ed.2d at 728.[41] This same standard should apply to urinalysis drug tests of government employees.

Determining the "standard of reasonableness applicable to a particular class of searches requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Ortega*, 94 L.Ed.2d at 724 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). All public workplace drug testing programs share the employer interests identified in the *Ortega* case—"supervision, control and the efficient operation of the workplace." 94 L.Ed.2d at 724. In certain work situations, drug-testing is justified by the additional substantial employer interests in promoting employee safety and promoting public confidence in the integrity of an agency (as in the instant case) and/or the compelling employer interests in protecting public safety or national security (as, for example, in the circumstances of random drug testing programs at some nuclear plants).

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[41] The Court decided that this standard should apply to the class of cases it described because it would "neither unduly burden the efforts of government employers to ensure the efficient and proper operation of the workplace, nor authorize arbitrary intrusions upon the privacy of public employees." *Id.*

Against the importance of these government interests in urinalysis drug testing must be balanced the nature and quality of the intrusion upon the employees' privacy interests. Some bodily intrusions, such as forcing open a suspect's mouth and pumping his stomach in search of hidden narcotics, are widely viewed as extreme invasions of privacy. *See, e.g., Rochin v. California*, 342 U.S. 165, 172 (1952). Although the lower courts that have considered the issue have expressed much disagreement as to the degree of invasion of privacy represented by urinalysis drug testing, the Chamber agrees with the Fifth Circuit that urinalysis testing is not as intrusive as an invasion of the body or an intrusion into the home, and that employees subjected to such testing do not suffer the indignity of either strip or body cavity searches. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 177 (5th Cir. 1987), *cert. granted* 108 S.Ct. 1072 (1988). In support of this view, the Chamber notes that urine is a waste product routinely discharged from the body, that urine testing is an accepted part of standard physical examinations, and that urine testing does not involve a physical invasion of the body.

In assessing the intrusiveness of urinalysis drug testing of government employees, it is also relevant that in many employment situations, such testing will not disturb the employee's reasonable expectations of privacy.[42] As this Court has noted "[t]he operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official" and employees' "expectations of privacy . . . may be reduced by virtue of actual practice." *Ortega*, 94 L.Ed.2d at 723.

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[42] It does not suffice for an employee to assert that he or she has an expectation of privacy. Rather, this Court considers whether those privacy expectations are of the kind that "society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Hudson v. Palmer*, 468 U.S. 517, 525 & note 7 (1984).

Workplace urinalysis drug tests, such as those alleged to violate the Fourth Amendment in this case, are regarded as reasonable and normal in the private-employer context. A large and increasing number of private companies have adopted the goal of a "drug-free workplace," and at a substantial number of private workplaces, both job applicants and employees are on notice that they must pass a urinalysis drug test in order to be employed or to be continued in employment.[43] That many private sector employees do not have reasonable expectations of privacy with respect to urinalysis drug testing is a factor to be considered in determining whether government employees have any such reasonable expectations and suggests that urinalysis drug testing of government employees is a relatively minor intrusion upon Fourth Amendment interests.

Given the range of very important employer interests described above, and the relatively minimal intrusion upon the privacy of government employees involved in urine drug tests, this Court should rule that all such tests, in the workplace context, must be evaluated by the "reasonableness under all the circumstances" standard.[44]

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[43] *See supra* note 3. The Chamber takes issue with the notion that drug testing is something very new, different, and sinister. At many private corporations, as well as at government agencies, urine samples have traditionally been taken as part of routine pre-employment medical examinations. Medical conditions and other information of a personal nature have been revealed by routine analysis of those urine samples, and confidentiality has been maintained. The information obtained by the urine testing has traditionally aided the company physician in determining an applicant's fitness for employment and, where appropriate, the proper placement for the applicant.

[44] If, however, the Court should decide that this standard is not applicable to the Customs Service's pre-promotion urinalysis drug testing program, based substantially upon the employer interest in governmental integrity, the Court should explicitly leave open until it has the appropriate case before it whether other workplace urinalysis drug testing programs justified by other employer interests—be they pre-employment, post-employment, random, periodic, accident-triggered, or "for cause"—should be measured by the "reasonableness under all the circumstances" standard. The Chamber respectfully submits that where the employer interests include the compelling interest in protecting public safety, where the basic premise of the drug testing program is deterrent and preventive in nature, and where the requirement of a warrant or of probable cause would clearly frustrate the purpose of such a testing program, the appropriate test must be "reasonableness under all the circumstances."

II. FOR GOVERNMENT EMPLOYMENT DRUG TESTING PROGRAMS TO BE REASONABLE UNDER ALL THE CIRCUMSTANCES, THERE MUST BE A FAIR BALANCE BETWEEN THE INTERESTS OF EMPLOYERS AND EMPLOYEES.

If the requirements of a warrant and probable cause are relaxed, the Fourth Amendment requires an inquiry into the employee's interests, and a fair balance between the employee and employer interests implicated in any particular drug testing program. The outcome of such balancing must be determined on a case-by-case basis. Relevant factors deserving recognition by this Court include the following:

A. Justification for the Test.

Various possible employer justifications for urinalysis drug tests have been set forth at page 7, *supra*, and will not be repeated here. In deciding whether a particular urinalysis drug test is reasonable under all the circumstances, the Court should identify the employer interest or interests justifying the test and should assign appropriate weights to those interests. The interest in protecting public safety is perhaps the most compelling and weighty of such interests.

B. Whether there is "Individualized Suspicion" or Its Functional Equivalent.

While "some quantum of individualized suspicion is usually a prerequisite to a constitutional search . . . the

Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976).[45] Accordingly, for certain administrative searches, and in highly regulated industries, courts have found that reasonable or particularized suspicion is not required. *See, e.g., Camara*, 387 U.S. at 536-39; *Shoemaker*, 795 F.2d at 1141-42; *Rushton v. Nebraska Public Power District*, 844 F.2d 562, 567 (8th Cir. 1988).

Where "for cause" testing is at issue, of course, individualized suspicion of some form would appear to be a *sine qua non*. But in the circumstances of a preventive, not-for-cause-based testing program such as a random drug testing program to promote important public safety interests, such a requirement may be unreasonable. Public disasters such as airplane crashes or nuclear plant mishaps caused by employees abusing drugs can occur before supervisors can detect a problem, but may be deterred or prevented by a random drug testing program. In such circumstances, individualized suspicion should not be required.

The Chamber agrees with the *Von Raab* majority that workplace urinalysis drug testing programs should be considered analogous to inspections to ensure compliance with a regulatory scheme in a highly regulated industry. 816 F.2d at 179-80. Inspections of the premises occupied by highly regulated businesses can be reasonable *even if made without any degree of reasonable suspicion*. *Id.* at 179 (citing *United States v. Biswell*, 406 U.S. 311 (1972)). The exception is justified in such circumstances because suspicionless searches are necessary to accomplish the legitimate goals of the regulatory scheme and because the well-publicized existence of the regulatory

[45] In *Ortega*, 94 L.Ed.2d at 729 (plurality opinion), this Court explicitly left undecided "whether individualized suspicion is an essential element of the [reasonableness under all the circumstances] standard . . . ."

scheme reduces the reasonable privacy expectations of those involved. *Id.* By analogy, employees in companies with well-publicized, safety-based, preventive drug testing programs have diminished expectations of privacy with respect to drug abuse.

Traditionally, where it has found a search to be reasonable under the Fourth Amendment even without individualized suspicion, this Court has required that there be other constraints on the discretion of the state officials conducting the search. These other constraints, which ensure that "the individual's reasonable expectation of privacy is not 'subject to the discretion of the officials in the field,' "[46] serve as functional equivalents to individualized suspicion. Accordingly, testing programs based upon a preventive justification should be considered reasonable if tests are administered to *all* employees in a particular company or division, or if the employees to be tested are determined on a *random* basis.

C. Integrity of the Drug Testing Program.

Whether a particular drug testing program is a "sufficiently productive mechanism," *Delaware v. Prouse*, 440 U.S. 648, 659 (1979), to justify its intrusion upon Fourth Amendment interests requires an analysis of the reliability and validity of the testing procedures, as well as of the design and implementation of the drug testing program in its entirety.

As has been demonstrated at pages 9-12, *supra*, the combination of initial screening with the EMIT test and confirmatory screening of initial positives with the Gas Chromatography/Mass Spectrometry procedures is highly reliable. In reviewing particular urinalysis drug testing programs, courts should focus on whether the employer has established strict chain of custody controls for the urine sample, uses a reliable, certified laboratory, and

[46] *Delaware v. Prouse*, 440 U.S. 648, 655 (1979), quoting *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967).

employs forensic level quality controls to monitor the laboratory's work. Courts should also inquire whether a challenged program affords employees who test positive the opportunity to question or explain the results. If the Court finds that a urinalysis drug testing program has these elements, it should be satisfied that the program is a reasonably productive mechanism for accomplishing the employer's legitimate goals.

D. Scope of the Test.

The argument that urinalysis drug testing is relatively non-invasive has been made at pages 21-22, *supra*, and will not be repeated here. But there is also the possibility noted by various lower courts and identified in the Fifth Circuit's opinion below that urine testing may disclose not only the presence of drug traces but much additional personal information about an employee. *Von Raab*, 816 F.2d at 175-76. Precisely what information it is proper to obtain from employment drug testing will depend upon the context and purposes of the testing—whether, for example, the testing is part of a complete medical examination or is being given solely to detect drug abuse by employees. A reasonable urinalysis drug testing program should have safeguards to assure that the information sought from the urine samples is directly related to the justifications for the testing and that information obtained from the testing is kept confidential to the maximum extent consistent with those justifications.

E. Manner of the Test.

A reasonable urinalysis drug testing program should be designed to avoid direct visual observation of the tested employee, thereby minimizing embarrassment and intrusiveness. The manner of the test can be even less invasive if the sample is taken in a *medical* setting, with a *nurse monitor*, because expectations of privacy with respect to such testing are lower in such a setting.

Reasonable urinalysis drug testing should also comply with the requirement that, when searches are permitted in the absence of individualized suspicion, the government must use safeguards to limit the discretion of managers and supervisors to impose such testing. *Prouse*, 440 U.S. at 655.

F. Place of the Test.

In judging the reasonableness of a particular urinalysis drug testing program, the Court should also ascertain whether the tests were conducted at a facility as private as practical.

G. Availability of Less Intrusive Alternatives to the Test.

A particular search may be reasonable even if its purpose might be accomplished by less intrusive methods. *See, e.g., Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983). The Chamber agrees with the Fifth Circuit, however, that the availability of alternative sources of information should be considered in determining the reasonableness of a particular search. *Von Raab*, 816 F.2d at 180 (footnotes omitted). The Chamber also agrees with the *Von Raab* majority that direct observation by supervisors [47] and/or checking employee backgrounds are not always effective alternative means for accomplishing the substantial employer interests that can be met with a properly designed urinalysis drug testing program. *Id.*

H. Nature of the Test.

While the Fourth Amendment applies to invasions of privacy for civil as well as for criminal investigatory purposes, the need for protection from such invasions diminishes if the investigation is "neither designed to enforce criminal laws nor likely to be used to bring criminal charges against the person investigated." *Von Raab*, 816 F.2d at 179. Accordingly, a particular urinal-

[47] *See supra* notes 39 & 40.

ysis drug test should have a better chance of being found reasonable if its consequences are non-criminal, and especially if they are rehabilitative.

CONCLUSION

For the reasons set forth above, this Court should rule that the appropriate standard for reviewing Fourth Amendment challenges to government urinalysis drug testing is "reasonableness under all the circumstances," and that the factors discussed above should be considered in making the reasonableness determination. The Court should also make clear that any holding in this case does *not* apply to urinalysis drug testing by private businesses.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION and ARGENT ACOSTA, President, Chapter 168, National Treasury Employees Union,

Petitioners,

v.

WILLIAM VON RAAB, Commissioner, United States Customs Service,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE COLLEGE OF AMERICAN PATHOLOGISTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does a urine drug testing program satisfy the requirements of the Fourth Amendment where it (a) covers only those persons who voluntarily apply for critical government jobs in which use of illicit drugs could cause substantial public harm, (b) utilizes reliable testing methods that effectively identify users of such drugs, and (c) is not more intrusive than reasonably necessary to accomplish its goals?

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INTEREST OF AMICUS CURIAE

Amicus curiae College of American Pathologists ("CAP") is a national medical specialty society comprised of approximately 10,800 pathologists. Founded in 1947, the CAP has been dedicated to pursuit of excellence in all areas of medical laboratory testing and to improvement of the quality of laboratory services available to the American public. The CAP has had a significant impact on standardization, improvement, and quality assurance of clinical laboratory procedures.[1]

The CAP recently has been extensively involved in the development and administration of forensic urine drug testing ("FUDT"). Recognizing the unique needs of laboratories performing FUDT, the CAP in 1987 developed an FUDT Laboratory Accreditation Program (in conjunction with the American Association of Clinical Chemistry), which includes initial and ongoing proficiency testing and inspections. Based on their expertise, the CAP and its members believe that urine drug testing can be an effective means to detect and deter drug use by workers and thereby to improve health, safety, and productivity in the American workplace. At the same time, the CAP, as an organization of physicians, is sensitive to the privacy interests implicated by mandatory testing and the negative impact that an

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[1] For example, the CAP Laboratory Accreditation Program, which currently accredits 4,000 laboratories through a rigorous inspection process, has for nearly twenty years been deemed an equivalent program for interstate licensure requirements by the Secretary of Health and Human Services under the Clinical Laboratories Improvement Act of 1967, 42 U.S.C. § 263a. The program also meets licensure requirements in approximately twenty-five states. The Joint Commission on Accreditation of Health Care Organizations, with the agreement of the federal government, has accepted the program in lieu of its own inspection of hospital laboratories since 1978.

unreliable drug testing program can have on the careers and lives of employees.

The CAP's interest in this case is to provide the Court with information regarding the public health implications of illegal drug use in the workplace and to assist the Court in establishing an appropriate framework for evaluating constitutional challenges to employment-based drug testing programs. This brief is limited to a discussion of constitutional issues. It does not address the wisdom of mandatory drug testing in any particular circumstance.[2]

PUBLIC HEALTH BACKGROUND

Chemical dependency and substance abuse may be the number one public health problem in the United States today. Bensinger, *Drugs in the Workplace: A Commentary*, 3 Behav. Sci. & Law 441, 442 (1985) (*"Drugs in the Workplace"*). A recent national survey documented that *tens of millions* of Americans regularly use illegal drugs. National Institute on Drug Abuse ("NIDA"), *National Household Survey on Drug Abuse: 1985 Population Estimates* (1987) (*"NIDA Survey"*). Approximately 25% of general hospital admissions are related to drug abuse; up to 40% of all hospitalizations for accidents or other injuries are drug-related; and 50% of psychiatric admissions are related to drug use. *Drugs in the Workplace, supra*, at 442.

A. Drug Use By American Workers

Illegal drug use has become a major problem in the American workplace. The U.S. Chamber of Commerce estimates that more than 40% of those entering the full-time work force have used illegal drugs in the prior year. M. de Bernardo, *Drug Abuse in the Workplace: An Employer's Guide for Prevention* 11 (U.S. Chamber of Commerce) (1987) (*"Employer's Guide"*). Moreover, "[a]s many as

[2] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court.

23% of all U.S. workers use dangerous drugs on the job." *Id.* at 12.

The costs of such pervasive drug use by workers are staggering. Drug users have three to four times as many accidents on the job. *Drugs in the Workplace, supra*, at 442-43. Medical costs and benefits are three times as high, and claims requests are five times as high. *Id.* Moreover, a 25% to 35% decrease in performance and productivity can be expected of drug-abusing workers. *Id.* at 444. The U.S. Chamber of Commerce estimates that the cost of substance abuse to the American economy is $60 billion annually. *Employer's Guide, supra*, at 12.

The greatest cost of drug use by the American work force, however, is measured in terms of human lives. The country's rail system provides a clear example:

> In a 14-month period beginning with the disastrous Conrail-Amtrak crash at Chase, Md., in January, 1987—in which 16 people died—there have been 37 accidents in which at least one worker tested positive for drugs, 4 in which the use of alcohol was found. The toll: 29 people dead, 341 injured and property damage in excess of $28 million.

Drugs, Trains and the Right to Safety, Chicago Tribune, May 18, 1988, at 22. *See Railway Labor Executives' Ass'n* v. *Burnley*, 839 F.2d 575, 594 (9th Cir.), *cert. granted*, 56 U.S.L.W. 3827 (U.S. June 7, 1988) (Alarcon, J., dissenting). The airline industry suffers from similar—and even more frightening—scenarios:

> The National Transportation Safety Board attributed a fatal 1983 air accident to illegal drug abuse. Two crewmen died when a cargo flight crash-landed at Newark airport. Autopsies showed that the pilot had been smoking marijuana, possibly while flying. In an incident [in March, 1986], a New York-based air-traffic controller who had been injecting three grams of cocaine daily at work, put a DC-10 jumbo jet on a collision course with a private plane. At the last moment, the smaller aircraft made an emergency landing.

Castro, *Battling the Enemy Within: Companies Fight to Drive Illegal Drugs Out of the Workplace*, Time, Mar. 17, 1986, at 53. Even the space program has not been immune from the drug problem. Dr. Howard Finkel, medical director of Rockwell's Space Shuttle division from 1981 through 1983, estimated that "20% to 25% of the Rockwell workers at the Palmdale, Calif. plant, the final assembly point for the four space shuttles, were high on the job from drugs, alcohol or both." *Id.* at 53. Defense industry executives also are concerned that workers who use drugs might sell defense secrets to support their habits or might be subject to blackmail. *Id.*

Concerns about drug-related corruption are particularly pronounced within the law enforcement community. Specialists estimate that corruption within the American criminal justice system—from the F.B.I. to big city police to local sheriffs—"is more widespread now than at any time since prohibition because of the explosion in the power and profits of the multibillion dollar illicit drug industry." Shenon, *Enemy Within: Drug Money is Corrupting the Enforcers*, N.Y. Times, Apr. 11, 1988, at A1 (*"Drug Money"*).

B. Testing For Drug Use By Employees

Given the problems associated with drug use in the workplace, employers in both the private and public sector have begun to implement programs to deter such use by employees. As an essential part of these programs, employers are requiring job applicants, as well as current employees who hold critical or public safety positions, to submit to laboratory tests that can detect drug use. A House Committee observed that, "the list of businesses requiring employees and job applicants to submit to drug tests has grown exponentially." *Failing the Test: Proficiency Standards Are Needed for Drug Testing Laboratories*, Report by the

Comm. on Gov't Operations, H.R. Rep. No. 527, 100th Cong., 2d Sess. 7 (1988) ("House Report").[3]

Tests for employee drug use also are common among public sector employers. The greatest impetus for drug testing of federal employees has come from President Reagan's 1986 Executive Order. *Drug-Free Federal Workplace*, Exec. Order No. 12564, 51 Fed. Reg. 32889 (1986) ("E.O. 12564"). That order pointed out particular problems posed by use of illegal drugs by federal employees:

> The use of illegal drugs, on or off duty, by federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law.

51 Fed. Reg. at 32889. For these reasons, the President determined that "[t]he use of illegal drugs by Federal employees . . . is contrary to the efficiency of the service," and he mandated the establishment of programs "to test for the use of illegal drugs by employees in sensitive positions."

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[3] By the end of 1987, more than 50% of the Fortune 500 companies had drug testing programs in place. House Report, *supra*, at 7. These programs have "reduced the number of employee accidents while increasing worker productivity." Adams, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U. Chi. L. Rev. 1335, 1337 (1987). For example, the Southern Pacific Railroad's drug abuse prevention program resulted in a 71% drop in on-the-job accidents and injuries due to human error in 1985 as compared to 1984. Angarola, *Product Safety, Not Drug Abuse*, A.B.A.J. 35 (Aug. 1986). Indeed, it is estimated that "[b]etween 65 and 80 percent of drug abuse problems would be resolved by a drug abuse prevention program that includes drug testing. . . ." *Employer's Guide, supra, at 13.*

Id. at 32890."[4] The Executive Order provides, however, that drug screening is not to be conducted "for the purpose of gathering evidence for use in criminal proceedings." E.O. 12564, 51 Fed. Reg. at 32892.

STATEMENT OF THE CASE

In July of 1986, the United States Customs Service ("Customs") implemented a program of urine drug testing to ensure that candidates for certain sensitive, "covered" positions are not users of illegal drugs.[5] Covered positions are those that require (1) direct involvement with drug interdiction and enforcement of related laws, (2) the carrying of firearms, or (3) the handling of classified materials. J.A. at 24-25. The program applies to all applicants for

[4] In drug screening programs established by public employers, as with private sector programs, the mere risk of detection serves significantly to deter employees/applicants from starting or continuing to use illicit drugs. For example, "[t]he use of illicit drugs in the armed forces has been driven to the lowest point in six years, and officers in all four services credit the drop to the deterrent of pervasive testing through urinalysis." Halloran, *Drug Use in Military Drops; Pervasive Testing Credited*, N.Y. Times, Apr. 23, 1987, at A16. The U.S. Navy, for example, found that the number of enlisted personnel identified by urine testing as using illicit drugs dropped from 48% in 1981 (when the testing program began) to less than 5% by 1985. Willette, *Drug Testing Programs*, in Urine Testing for Drugs of Abuse 6 (NIDA 1986).

[5] On April 11, 1988, the Department of Health and Human Services ("HHS") published guidelines to implement the Executive Order. *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, 53 Fed. Reg. 11970 (1988) ("HHS Guidelines"). Section 1.1(b) of the HHS Guidelines requires that any federal agency drug testing program in place as of September 15, 1986 be brought into compliance with the guidelines no later than July 10, 1988. 53 Fed. Reg. at 11979. Thus, *amicus* CAP's comments about the Customs program presume that the program will reflect the standards required by the guidelines.

covered positions, whether or not they are current Customs employees.[6]

SUMMARY OF ARGUMENT

Urine drug testing of applicants for government employment is a constitutionally reasonable search if it is (a) "justified at its inception," and (b) " 'reasonably related to the objectives of the search and not excessively intrusive of light of . . . the nature of the [misconduct].' " *O'Connor* v. *Ortega*, 107 S. Ct. 1492, 1503 (1987) (quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 335, 342 (1985)).

A urine drug testing program can be "justified at its inception," even without a showing of individualized suspicion, if the program utilizes drug screening solely for the purpose of ensuring employee fitness. Because fitness standards are inherently non-individualized, this purpose can only be accomplished through a uniform program conducted without particularized suspicion. Moreover, the lack of official discretion involved in such a standardized testing program, together with the purely administrative use of test results, provide safeguards adequate to satisfy Fourth Amendment concerns. Finally, the program must be confined to those job categories which pose a risk of substantial harm to the public if performed under drug-related impairments. Under these circumstances, the government's legitimate interests as employer will outweigh the limited privacy intrusion resulting from drug screening of job applicants. The Customs program at issue here meets these conditions.

A urine drug testing program, as administered, also must be reasonably related to its objective and not excessively intrusive. A drug screening program meets these standards if it uses reliable testing techniques, is an effective method for

[6] The procedures utilized in the program are described in the opinion of the Court of Appeals, *National Treasury Employees Union* v. *von Raab*, 816 F.2d 170, 173-74 (5th Cir. 1987). *See also* J.A. at 23-44. The proceedings below are described in the Brief for the Petitioners ("Pet. Br.").

detecting recent illegal drug use, and contains safeguards against unnecessary interference with personal privacy. The Customs drug testing policy satisfies each of these requirements.

ARGUMENT

THE CUSTOMS SERVICE DRUG SCREENING PROGRAM IS A REASONABLE SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT BECAUSE IT IS JUSTIFIED AT ITS INCEPTION AND APPROPRIATELY LIMITED IN SCOPE.

Because urine is normally discharged with a legitimate expectation of some degree of physical privacy, a governmental program of urine drug testing constitutes a search within the meaning of the Fourth Amendment.[7] The Fourth Amendment bars only unreasonable searches and seizures, however. An employment-related search is reasonable if it is " 'justified at its inception' " and the scope of the search is " 'reasonably related . . . to the circumstances which justified the interference in the first place.' " *O'Connor, supra*, 107 S. Ct. at 1503 (quoting *T.L.O., supra*, 469 U.S. at 341). Customs' drug screening program meets both of these criteria.

A. Customs' Program Of Drug Screening Applicants For Critically Sensitive Positions Is Justified At Its Inception By The Strong Interest In Ensuring Employee Fitness For Those Positions.

In analyzing whether a work-related search is "justified at its inception," it is necessary to examine whether the government interests involved outweigh the resulting impact on the employees' legitimate privacy interests. *O'Connor, supra*, 107 S. Ct. at 1501. This determination requires an

[7] Every court of appeals to consider the question whether urine drug testing is a search has reached an affirmative answer, including the court below. In light of this unanimity, the CAP will not further address this matter, except to state that it agrees with this conclusion.

inquiry into three factors: (1) the purposes underlying the search, and a determination of whether those purposes can be accomplished without "some easing of the restrictions to which searches by public authorities are ordinarily subject," *T.L.O., supra*, 469 U.S. at 340; (2) the strength of these purposes; and (3) the countervailing strength of the privacy interests implicated by the search.

1. *Drug screening of job applicants serves the legitimate purpose of ensuring employee fitness. This purpose cannot effectively be accomplished without generalized testing in the absence of individualized suspicion.* a. Public employers have a legitimate administrative interest in ensuring that the persons they employ to carry out the tasks of government are suitable and fit to perform their functions. *See, e.g., O'Connor, supra*, 107 S. Ct. at 1502("public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner"). Toward that end, government, like any private employer, is entitled to erect reasonable work-related standards of competency and integrity as conditions of initial or continued employment. *See, e.g., Washington* v. *Davis*, 426 U.S. 229, 245-46 (1976); *Dixon* v. *McMullen*, 527 F. Supp. 711, 721 (N.D. Tex. 1981). These standards typically reflect minimally acceptable qualifications for job performance. Like other work-related qualifications, freedom from illicit drug use is a legitimate measure of fitness for certain employment positions.[8]

b. Because freedom from illicit drug use is a legitimate standard of employee fitness, an "individualized suspicion" standard is inapplicable. The goal of ensuring employee fitness on a prospective basis simply cannot be accomplished without using generalized mechanisms and uniform qualify-

[8] The Union acknowledges that Customs' objective "to detect persons who use illegal drugs and deter them from assuming positions in which they will be involved in drug interdiction," is "an important one." Pet. Br. at 39-40.

ing tests. In this respect, testing for drug use is quite similar to (and often is a part of) other work-related physical examinations which are a routine requirement for many government positions. These physical tests are administered not because of any "individualized suspicion" regarding a given employee. Rather, such tests are utilized precisely because they measure the job fitness of *any* employee holding the position. *See, e.g., Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 311 (1976); *id* at 325-27 (Marshall, J., dissenting). Consequently, numerous courts have upheld drug screening when conducted as part of a routine, reasonably required, annual medical exam.[9]

Adoption of an "individualized suspicion" standard would effectively spell an end to such preventive government efforts to screen its work force, either initially or during the tenure of employment, for potential drug-related or other physical problems.[10] Instead, government would be rele-

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[9] *See, e.g., Jones* v. *McKenzie*, 833 F.2d 335, 340 (D.C. Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3739 (U.S. Apr. 26, 1988); *Wrightsell* v. *City of Chicago*, 678 F. Supp. 727, 733 (N.D. Ill. 1988); *McDonell* v. *Hunter*, 612 F. Supp. 1122, 1130 n.6 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302, 1316 (8th Cir. 1987). "Employers clearly may impose reasonable employee fitness requirements and require tests reasonably calculated to measure such fitness, especially if the work is hazardous or affects public safety. Regular examinations are a common and accepted means of testing the general fitness of employees or prospective employees, and urinalyses are often part of those examinations." Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 Am. Bus. L. J. 309, 337 (1986).

[10] The Customs program involves drug screening of both job applicants who are not employed by Customs and current employees seeking transfer to a sensitive covered position. Although only the latter part of the program is at issue here—because no outside applicants are party to this suit—any such technical distinction is irrelevant to the scope of the Union's argument.

gated to dealing with such problems and their substantial attendant risks only after the problems have become so serious as to be visibly manifest. Especially in the context of critically sensitive government programs—in which a drug-related mishap can mean disaster to the public health or safety—this restricted *post hoc* approach can be too little, too late.[11] *See* J.A. at 15.

The Union urges, though, that regardless of the purposes underlying employee drug testing, no "easing of the restrictions" of the sort traditionally applicable to criminal investigations is either necessary or warranted. Specifically, it claims that reasonably-based individualized suspicion of wrongdoing by an employee is a *sine qua non* to any drug testing of that employee.[12] However, "the Fourth Amend-

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Indeed, if work-related reasons do not suffice to justify fitness testing of inside applicants absent individualized suspicion, it is difficult to see why a different standard would apply to identical "searches" of outside applicants for the same positions. Conversely, once it is conceded that work-related reasons can justify drug testing (or for that matter *any* physical testing) of outside applicants, there is no principled reason not to apply a similar reasonableness standard with respect to the testing of current employees.

[11] This Court has previously recognized that since "public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agencies and the public interest can be severe," forced delays in detecting such problems "would impose intolerable burdens on public employers" which "will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest." *O'Connor, supra*, 107 S. Ct. at 1502. *See T.L.O., supra*, 469 U.S. at 353 (Blackmun, J., concurring).

[12] Although the Union alternatively argues for adoption of a warrant or "probable cause" standard for employee drug screening, *O'Connor* expressly rejected this standard for work-related searches. Instead, this Court held that both noninvestigatory and investigatory work-related searches should be judged by "the

ment imposes no irreducible requirement of such [individualized] suspicion." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976). This Court has "not hesitated" to "eas[e] . . . the restrictions to which searches by public authorities are ordinarily subject," *T.L.O., supra*, 469 U.S. at 340-41, where "special needs, beyond the normal need for law enforcement" so require. *Id.* at 351 (Blackmun, J., concurring). *Accord O'Connor, supra*, 107 S. Ct. at 1500.

Indeed, the very uniformity of interest in employee fitness which renders "individualized suspicion" irrelevant, also helps to satisfy Fourth Amendment concerns about arbitrary government action. Because freedom from illicit drug use is a legitimate minimal qualification for covered job positions, the Customs program requires testing of *all* applicants.

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standard of reasonableness under all the circumstances." 107 S. Ct. at 1502; *see also id.* at 1506 (Scalia, J., concurring). The Union purports to distinguish *O'Connor*, however, by claiming that the standard it adopts applies only to work-related searches of "the *place* of work," not to searches of "the person or personal possessions of the employee." Pet. Br. at 25. This was not the basis for the standard adopted in *O'Connor*, and the Court's holding is not so limited: "We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *O'Connor, supra*, 107 S. Ct. at 1502. In fact, the "reasonableness standard" adopted in *O'Connor* was derived in large measure from *T.L.O., supra*, 469 U.S. 325, in which personal possessions *were* searched. The common link between the cases, and the basis for adoption of the "reasonableness standard" in both, is recognition of the special needs and interests intrinsic to the particular role performed by government (*e.g.*, as employer), which render rigid adoption of criminal procedures inappropriate. It is these needs which determine the proper standard of reasonableness. The nature of the items searched is only a factor to be weighed in making actual determinations of what is reasonable.

Moreover, the testing procedures are themselves uniform. *See* J.A. at 26-32; HHS Guidelines, *supra*, 53 Fed. Reg. at 11980-84. This absence of official discretion in the Customs program provides the regularity and certainty necessary to protect against "arbitrary government invasions of privacy," *T.L.O., supra*, 469 U.S. at 335, and obviates the need for a showing of particularized suspicion.[13]

Finally, a requirement of individualized suspicion is particularly inappropriate here because drug screening of job applicants for governmental positions is not undertaken for law enforcement purposes. Instead, its purpose is administrative, *i.e.*, ensuring prospective employee fitness. "[T]he need for protection against governmental intrusion diminishes if the investigation is neither designed to enforce criminal laws nor likely to be used to bring criminal charges against the person investigated." *von Raab, supra*, 816 F.2d at 179. *Cf. O'Connor, supra*, 107 S. Ct. at 1500-01; *South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5 (1976); *Wyman* v. *James*, 400 U.S. 309, 323 (1971).

Drug screening however, is specifically directed at discovery of an illegal activity and can reveal past illegal conduct.

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[13] "In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Delaware* v. *Prouse*, 440 U.S. 648, 655 (1979) (citations omitted). *See Transport Workers', Local 234* v. *Southeastern Penn. Transp. Auth.*, 678 F. Supp. 543, 551 (E.D. Pa. 1988) (finding drug screening program reasonable, in part because of safeguards provided against the public employer's exercise of discretion). In the analogous context of administrative inspections, this Court has regularly permitted searches in the absence of individualized suspicion where a statutory inspection program provides sufficient certainty and regularity in its application to control unbridled administrative discretion. *See, e.g., New York* v. *Burger*, 107 S. Ct. 2644 (1987); *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981).

Consequently, in order for employee drug testing to be justified at its inception by its limited administrative purpose, the use of test results must be restricted in accordance with the scope of that justification. In other words, employee drug testing results must be utilized only to determine employee suitability.[14] The Customs program fulfills this condition because it is governed by E.O. 12564, which expressly states that "[d]rug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings." 51 Fed. Reg. at 32892. Drug-testing under such circumstances largely sheds its enforcement overtones and becomes no different from any other job qualification standard.[15]

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[14] The notion that the government as employer may be entitled to condition hiring or continued employment on the employee's production of work-related data or information which it could not compel in its law enforcement capacity, provided that information is then not used for law enforcement purposes, is not peculiar to the Fourth Amendment. Fifth Amendment jurisprudence provides a direct parallel. For example, this Court has recognized that public employees may be compelled to respond to potentially incriminating questions relevant to their job, or be discharged for refusing to do so, provided that the answers cannot be used against them in subsequent criminal prosecutions. *See Lefkowitz* v. *Turley*, 414 U.S. 70, 77-79 (1973). *See also Lefkowitz* v. *Cunningham*, 431 U.S. 801, 803-05 (1977). *Cf. Orloff* v. *Willoughby*, 345 U.S. 83, 91 (1953) (army doctor can be denied commission for his refusal on Fifth Amendment grounds to provide certain information on application).

[15] The absence of criminal consequences is a factor which many courts have found to be significant in evaluating the reasonableness of drug screening programs. *See, e.g., Rushton* v. *Nebraska Public Power District*, *supra*, 844 F.2d 562, 566-67 (8th Cir. 1988) (upholding drug-testing of nuclear power plant engineers where "the results of urinalysis are being used solely to determine a person's fitness for work; they are not turned over to the police").

2. *Drug screening is justified for job categories in which employee drug use poses a risk of substantial harm to the public.* A public employer's interest in preventing illicit drug users from entering or continuing in an employment position is compelling when undetected drug use threatens substantial public harm. In some cases, the potential harm from employee drug use is so great that the threat of even a single instance of impaired performance cannot be tolerated. The human costs of an airplane collision, a train accident, or a nuclear explosion are simply too great to permit drug use and impaired employee performance to come to light that way.[16] In other cases, *e.g.*, clerical employees dealing with nonconfidential information, there is little risk to the public if the government is required to await some evidence of job impairment before being permitted to compel drug testing.

The jobs of the Customs employees whose testing is at issue here fall at neither end of this spectrum. These jobs do, however, involve matters affecting significant public health, safety, and welfare concerns. In the case of positions requiring the employee to handle firearms (J.A. at 37), those concerns are obvious. Impaired physical performance poses dangers to human life and safety. J.A. at 113.

The threat to the public from illicit drug use by the other covered categories of Customs employees—those who have direct involvement with drug interdiction and enforcement of related laws, or who handle classified materials—is less direct and does not consist primarily of physical or mental

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[16] *See, e.g., Dew* v. *Halaby*, 317 F.2d 582 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 951 (1964) (upholding discharge of admitted drug user employed as an air traffic controller); *Rushton*, *supra*, 844 F.2d at 565 (upholding drug testing of nuclear power plant employees); *Division 241 Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976) ("the CTA has a paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs"), *cert. denied*, 429 U.S. 1029 (1976).

impairment in job performance. *But see* J.A. at 16. Instead, it is the risk that drug use will lead to corruption or other disregard for law enforcement responsibilities.[17] While this threat is more indirect than that posed by the immediate physical effects of drug use, even the Union concedes the importance of preventing drug users "from assuming positions in which they will be involved in drug interdiction." Pet. Br. at 40.[18] Moreover, the magnitude of the potential consequences is very great. The breakdown of the drug interdiction program through corruption of susceptible drug-using Customs employees, or through lax enforcement of the law, threatens to drastically enlarge the pain, destruction, and death which illegal drugs already cause to millions.

Even though the Union acknowledges the potentially devastating effects of drug use by Customs employees (Pet. Br. at 39-40), it argues that there is no need for testing because there is no reason to believe that current Customs employees actually use drugs. Pet. Br. at 39. Customs employees are not, however, immune from the vices which plaque our society at large. Drug use by Customs employees

[17] In *Masino* v. *United States*, 589 F.2d 1048 (Ct. Cl. 1978), the court upheld the discharge of a Customs inspector found to have engaged in illegal drug use. The court concluded that, ". . . use of the very contraband which a law enforcement officer is sworn to interdict, is clearly misconduct which 'speaks for itself.' " *Id.* at 1056.

[18] The Union suggests that close monitoring by supervisors of employee job performance should suffice to detect drug-related problems. *See* Pet. Br. at 35- 36, 43-45 nn. 36-37. This alternative is inadequate. First, there are job categories for which it is simply too risky to await the appearance of signs of impairment. Second, an opportunity to observe prior employee performance is often of little value in assessing the employee's integrity in matters of drug use. *See Mullholland* v. *Department of Army*, 660 F. Supp. 1565, 1569 (E.D. Va. 1987). This is especially true for the Customs Service where much work is performed in the field, making close supervision impracticable.

has occurred. *See, e.g., Masino* v. *United States*, 589 F.2d 1048, 1056 (Ct. Cl. 1978). Moreover, Customs employees have proved susceptible to drug-related corruption. Indeed, "no federal agency has been so stung by drug corruption as the Customs Service." *Drug Money, supra*, at A1. In 1986 the agency launched Operation Clean Sweep, a year-long anti-corruption crackdown, the largest in its history. The operation resulted in 16 criminal prosecutions of customs inspectors. Almost all the cases involved bribery, and most were drug-related. Schacter, *Customs Service Cleans House in a Drive on Drug Corruption*, L.A. Times, June 16, 1987, at 3.

More fundamentally, however, even if Customs were currently drug-free, this by no means diminishes the extent of its interest in remaining that way.[19] Government need not, as the Union appears to suggest, stand by and await the occurrence of a foreseeable potential disaster before it is permitted to act. For example, it need not await the tragedy of needless deaths through train accidents or airplane crashes before it gains a legitimate interest in ensuring an unimpaired transportation work force. The notion that a public employer may not anticipate the spread of a serious problem that afflicts society at large, or act to prevent a tragedy in a specific context until it actually arises in that context, is both dangerous and unprincipled.

[19] The Union relies on the results of a five-month testing period before Customs' drug screening program was enjoined to suggest the absence of any need for a drug testing program. Pet. Br. at 47. But these results do not speak to the magnitude of drug use *absent* a drug testing program. *Cf. Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979) ("That there has been only one instance where [a prison] inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises").

3. *Drug screening of job applicants is not highly intrusive.* The fact that public employers have a compelling interest in assuring that employees in certain sensitive positions do not use illegal drugs does not by itself suffice to "justify at its inception" any search which might advance that goal. These interests do not justify highly intrusive searches in the absence of individualized suspicion, *e.g.*, searches of employees' private residences. *T.L.O., supra*, 469 U.S. at 342 n.8. Rather, the government's interests must be balanced against the nature and extent of the intrusion upon the employees' legitimate expectations of privacy. *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). Customs' systematic urine drug testing of job applicants entails only a relatively slight intrusion, however. Moreover, the applicants have reduced privacy interests to begin with.

a. The intrusiveness of urine drug testing is relatively slight and easily overstated. *See* Pet. Br. at 21, 38 (describing urine testing as "frightening," "humiliating," and "degrading"). It does not require any bodily invasion or physical contact between the individual being tested and the monitor. Thus, it is even less invasive than a blood test. *Schmerber* v. *California*, 384 U.S. 757 (1966).[20]

[20] The Union asserts that urine drug testing is "far more invasive than any search or seizure this Court has found reasonable on less than probable cause." Pet Br. at 28. However, this Court and others have sustained searches involving even bodily touchings, *e.g.*, pat-downs, in a variety of contexts in which individualized suspicion for the search has been absent. *See, e.g., Chimel* v. *California*, 395 U.S. 752, 763 (1969) (authorizing personal search of arrestee and areas within his immediate physical control in order to protect officer); *Singleton* v. *C.I.R.*, 606 F.2d 50 (3rd Cir. 1979) (pre-boarding anti-hijacking pat-down search of all airline passengers). *Cf. Rushton, supra*, 844 F.2d at 563. Required submission to physical contact of this sort with a government agent would seem more intrusive than providing a urine sample.

The physical passing of urine in a monitored situation does raise privacy concerns.[21] However, people frequently pass urine in public washrooms without experiencing significant embarrassment or humiliation. Most people also are accustomed to providing urine samples in conjunction with employment-related medical examinations and in other settings.[22] Indeed, provision of a urine sample, like the more intrusive blood test, has "become routine in our everyday life" because it is "commonplace in these days of periodic physical examinations." *Schmerber, supra*, 384 U.S. at 771 & n.13. *See also Winston* v. *Lee*, 470 U.S. 753, 762 & n.5 (1985). Therefore, these "tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Id.*

b. Not only is the intrusiveness involved in urine drug testing relatively slight, there is a consensual element to the Customs program which reduces the privacy interests involved. *Cf. Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973) (consent waives right to object to warrantless search). First, it lies within the employee's own control

[21] There is also a potential informational aspect to unrestricted urine testing which can implicate privacy concerns. These concerns are not significant, however, in the context of the Customs program due to the limited nature of the testing involved, *i.e.*, the program tests only for certain designated drugs and restricts the use of even that information. *See infra* pp. 29-30 & n.36. Moreover, employers, including the government, generally are entitled to ask employees, *e.g.*, on employment applications, about their use of such drugs. Consequently, employee privacy interests in this information are minimal.

[22] The Union does not suggest that the government is precluded from requiring a prospective employee to undergo a general physical examination, including urine testing, as a condition of initial employment. But it is difficult to understand how urine testing as part of an overall more extensive and invasive procedure can be deemed an acceptable privacy intrusion while testing by itself cannot be.

whether he or she takes the test. The program applies only to applicants for certain positions. Those persons know in advance that drug testing is a condition of employment. Moreover, an applicant tentatively selected for a covered position is given at least five days notice before the urine collection is scheduled (J.A. at 27).[23] Thus, a prospective applicant may freely choose not to undergo drug testing simply by not applying for one of the covered positions or by withdrawing an application, without penalty, prior to submitting a urine sample. *Cf. McMorris* v. *Alioto*, 567 F.2d 897, 900-01 (9th Cir. 1978) (finding implied consent to search by persons entering courthouse).[24] No one is forced to provide a urine sample by the threat of termination or demotion. J.A. at 36.

Second, and more broadly, by accepting government employment, and thereby gaining access to government facilities and responsibilities not otherwise available to private citizens, the employee knowingly subjects himself to an extended government interest as employer. Public employees' legitimate expectations of freedom from government intrusion are thus foreseeably less in work-related matters than that of their private sector counterparts. As the Fifth Circuit correctly observed, this situation is therefore analogous to a highly regulated private industry, in which "the

[23] Although advance notice of a drug testing requirement may not be sufficient to redeem an otherwise unreasonable search, "it may be taken into account as one of the factors relevant to the employees' legitimate expectation of privacy." *National Federation of Federal Employees* v. *Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987).

[24] *See also Singleton* v. *C.I.R.*, *supra*, 606 F.2d at 52 (finding implied consent in decision to board aircraft with advance notice of search requirement); *United States* v. *Sihler*, 562 F.2d 349, 351 (5th Cir. 1977) (upholding prison guard's consent to search as condition of employment); *United States* v. *Ellis*, 547 F.2d 863, 866-67 (5th Cir. 1977) (finding consent to search by persons entering military base).

very existence of the federal regulatory program diminishes the reasonable expectations of privacy of those involved in the industry." 816 F.2d at 179-180. *See also Rushton*, *supra*, 844 F.2d at 566; *Shoemaker* v. *Handel*, 795 F.2d 1136, 1142, (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986). Similarly, the pervasiveness of government regulation of its employees—which is far greater than the extent of regulation in even the most highly regulated private industry—diminishes their legitimate privacy expectations in work-related matters.

In sum, Customs' strong interest in screening job applicants for drug use, coupled with the standardized nature of the program, clearly outweighs the limited interference with individual privacy that will occur. In these circumstances, the drug screening program is justified at its inception notwithstanding the absence of a showing of individualized suspicion. *See T.L.O.*, *supra*, 469 U.S. at 342 n.8.

B. The Scope Of Customs' Drug Screening Program And The Manner In Which It Is Conducted Are Reasonably Related To The Program's Objectives And Are Not Unduly Intrusive.

To pass constitutional muster, a search must also use procedures that "are reasonably related" to its objectives and " 'not excessively intrusive in light of . . . the nature of the [misconduct].' " *O'Connor*, *supra*, 107 S. Ct. at 1503 (quoting *T.L.O.*, *supra*, 469 U.S. at 342). In the context of a government drug screening program, the following factors should be considered in assessing whether a particular program meets these requirements.

First, drug testing programs should utilize reliable testing methods, so as to minimize the possibility of employees incorrectly being accused of using illegal drugs. Second, the manner in which a drug testing program is conducted must be reasonably likely to achieve its goals, or else it will be unable to produce the public benefits that justify the search in the first place. *See Delaware* v. *Prouse*, 440 U.S. 648, 658-59 (1979). Third, a drug testing program must be no

"more intrusive then [is] reasonably necessary to accomplish its goals." *Winston, supra*, 470 U.S. at 761. The Customs drug testing program satisfies each of these conditions.[25]

1. *Reliability of drug testing methods.* "Reliable discrimination between the presence or absence of specific drugs or their metabolites is critical not only to achieve the goals of the testing program but to protect the rights of subjects." CAP, *Standards for Accreditation: Forensic Urine Drug Testing Laboratories* 3 (1988) ("CAP Standards"). The urine drug testing program implemented by Customs is highly reliable. It combines state-of-the-art technology; detailed collection, chain of custody and record-keeping procedures; and strict quality assurance controls.

a. *Technology.* The Customs program provides the best available technology for detecting drug use. The program combines a sensitive screening method and a "gold-standard" confirmation technique to assure that a confirmed positive result accurately reflects the presence of a drug or its metabolite in an employee's urine.[26] The screening test (the enzyme-multiplied-immunoassay technique or "EMIT" test) is based on a sensitive immunological reaction between a drug (or metabolite) in an individual's urine

[25] The drug testing program also should not be so broad that it promotes other governmental interests, *e.g.*, law enforcement goals, or covers an unduly large class of subjects. As already discussed, *see supra* pp. 13-14, 19-20, the Customs program meets this criterion.

[26] Urine is the preferred biological material for drug analysis because the kidneys concentrate drugs or their metabolites, and the bladder acts as a reservoir. Batjer, *Done Properly, Drug Testing Has Value*, The Straight Source (Wash. State Substance Abuse Coalition Nov.-Dec. 1986) ("*Drug Testing Has Value*"). Moreover, urine is easier to obtain than blood, and it is easier to analyze because there is little interference from protein or cellular constituents. *Id.* Thus, urine testing is the most common method of testing for drug use.

and antibodies produced by injecting an animal with the specific drug in question. To guard against false positive results, all EMIT-positive samples are subjected to sophisticated gas chromatography/mass spectrometry ("GC/MS") analysis for confirmation. *See* 53 Fed. Reg. at 11983. The GC/MS provides direct evidence of the unique molecular structure of the drug as well as precise quantitative data. Only specimens confirmed positive by GC/MS are reported as positive. *See* 53 Fed. Reg. at 11983. Indeed, the GC/MS procedure "is recognized as the state-of-the-art method and is 100% accurate for chemical, drug or drug metabolite identification." *National Federation of Federal Employees* v. *Carlucci*, 680 F. Supp. 416, 428 (D.D.C. 1988).[27] *See, also* Pet. Br. at 9; *von Raab, supra*, 816 F.2d at 174.

b. *Collection and chain of custody.* In addition to state-of-the-art technology, the Customs program utilizes detailed and rigorous collection, chain of custody, and record-keeping procedures. Although the program does not provide for direct observation of the act of urination, precautions are provided to ensure the integrity and identity of the specimen. *See* 53 Fed. Reg. at 11980-82. Among the precautions included to ensure unadulterated samples are the following: (1) close attention by the collection site person to any unusual behavior by the employee providing the specimen; (2) the use of toilet bluing agents to prevent dilution of the

[27] The GC/MS is highly specific, *i.e.*, it will be negative in the absence of the particular drug in question. Thus, the instrument sets the "gold standard" in testing for drugs because it excludes discrepant results. *Drug Testing Has Value, supra.* A survey of technical experts recently determined that, regardless of the initial screening method used, the most reliable confirmatory method is the GC/MS. Hoyt, Finnigan, Nee, Shults & Butler, *Drug Testing in the Workplace—Are Methods Legally Defensible?*, 258 J.A.M.A. 504, 507 (1987). It should be noted, however, that although the GC/MS is clearly an accurate and specific confirmatory test, other methods of confirmation also may prove reliable.

specimen with water from the tank or bowl, and the removal of any other water source from the enclosure where the sample is given; and (3) inspection of the sample immediately after collection to determine its temperature, color, and any signs of contamination. 53 Fed. Reg. at 11981. Moreover, if there is any reason to believe that a particular employee has altered or substituted the specimen, a second specimen is obtained as soon as possible under direct observation. *Id.*

An official chain of custody form is used to maintain control and accountability of each urine sample from the point of collection to final disposition. 53 Fed. Reg. at 11981-82. While every effort is made to minimize the number of persons actually handling a specimen, each time a sample is handled or transferred, the date and purpose is documented on the form and every individual in the chain is identified. *Id.*

c. *Laboratory quality assurance.* Laboratories that perform urine drug testing for Customs are required to establish a quality assurance program "which encompasses all aspects of the testing process." 53 Fed. Reg. at 11984. These laboratories must meet precise quality control requirements for both the EMIT and the GC/MS procedures, and must demonstrate proficiency through performance tests, including blind performance tests. *Id.* at 11984-85. Laboratory personnel also are required to meet specific education and experience standards "to ensure their competence and credibility as experts on forensic drug urine testing. . . ." *Id.* at 11970.

In addition, HHS has determined that a separate laboratory certification program is necessary to respond to the unique requirements of federal drug testing, and "to achieve maximum accuracy of test results." 53 Fed. Reg. at 11970, 11986. The HHS guidelines establish minimum criteria for the certification and the revocation of certification of laboratories performing drug testing of federal employees, and set forth standards and procedures for periodic review of certified laboratories. *Id.* at 11986-89. "Only certified laboratories will be authorized to perform urine testing for Federal agencies." *Id.* at 11976.[28]

2. *Effectiveness of the drug testing program.* The Customs urine drug testing program is effective in detecting the use of illegal drugs by an employee. It may not determine precisely when illegal drugs were used, how much of a drug was taken, or the extent of impairment resulting from drug use. However, an unexplained confirmed positive test result means that an employee has used an illegal drug, and illegal drug use, whether on or off duty, is inconsistent with the performance of Customs' responsibilities.[29]

The Union argues, however, that its members can easily thwart the urine drug test by substituting a clean sample for their own, or by adulterating the specimen with a contaminant such as soap, which will interfere with the EMIT test and produce a negative result. *See, e.g.,* Pet. Br. at 46; J.A. at 60. This is not the case. Although the program provides for only close, not direct, observation of the employee providing the urine sample, the HHS Guidelines require the

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[28] The CAP/AACC FUDT Laboratory Accreditation Program has established equivalent criteria for accrediting private sector laboratories that are engaged in urine drug testing for legal, regulatory, safety, employment and other non-medical purposes. *See* CAP Standards, *supra*.

[29] Possible alternative explanations for the positive test result are reviewed before the result is confirmed as positive and reported to agency officials. 53 Fed. Reg. at 11985-86. When an employee provides a urine specimen, he or she will be required to fill out a Drug Screening Pre-test Form, indicating whether any medications were taken during the past thirty days and/or any legitimate contact was had with illegal substances during that period. J.A. at 29. If the employee tests positive, the Pre-test Form is reviewed to determine if use of prescription drugs or legitimate contact with illicit drugs could have caused the positive result. J.A. at 33-34. The employee also has an opportunity to discuss the test result with the Drug Screening Coordinator.

collection site person to watch for any unusual behavior by the employee, and to inspect the urine specimen to determine its temperature, color, and any signs of contamination. 53 Fed. Reg. at 11981. Drug-testing laboratories are also well equipped to perform simple tests to detect dilution and/or adulteration of samples.[30] Thus, "the Federal program allows individual privacy with the necessary precautions to prevent adulteration of the specimen." House Report, *supra*, at 9.[31]

The Union further asserts that employees can avoid detection by temporarily abstaining from drug use for a few

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[30] Many FUDT laboratories do, in fact, perform preliminary tests to determine the integrity of a urine specimen. For example, the pH of urine, *i.e.*, its acidity or alkalinity, can be determined accurately with pH paper which, when immersed in a sample, will take on a characteristic color depending upon the pH of the specimen. Annino & Giese, *Clinical Chemistry: Principles and Procedures* 384 (4th ed. 1976). The pH of the urine can demonstrate whether the specimen has been adulterated with detergent. Similarly, a determination of specific gravity, *i.e.*, a comparison of the weight of a small volume of the specimen to the weight of the same volume of water, will demonstrate whether the specimen is unusually dilute, *e.g.*, because the employee drank large volumes of water prior to providing the specimen. *Id.* at 386-87.

[31] Any attempt by an employee to adulterate or substitute a urine specimen could result in sanctions by the Customs Service J.A. at 33. Moreover, "experience under testing programs [has demonstrated] that . . . . [t]he percentage of employees who are sufficiently committed to illegal drug use that they are prepared to chemically tamper with a specimen, or to substitute a 'clean' specimen is so low as to have only a marginal effectiveness on the effect of the program." Statement of Richard K. Willard, Asst. Attorney General, Civil Div., U.S. Dept. of Justice, *The President's Program to Foster a Drug-Free Federal Workplace*, presented to the Subcomm. on Human Resources, Comm. on the Post Office and Civil Service, U.S. House of Representatives (Sept. 25, 1986).

days before the test. *See, e.g.*, Pet. Br. at 47 n.38 ("[the] five day minimum abstention period would, in virtually every case, result in a clean urine sample"). However, "[w]ith drugs such as marijuana or PCP, exposure could have occurred weeks before the testing." K. Zeese, *Drug Testing Legal Manual* 2-24 (1988) ("*Drug Testing Manual*").[32] In fact, any predictions about the duration of detection must consider many variables, including the employee's individual physical condition, fluid balance, and state of hydration, and the route and frequency of ingestion. American Medical Association, Council on Scientific Affairs, *Scientific Issues in Drug Testing*, 257 J.A.M.A. 3310, 3112 (1987). Drug concentrations in biological fluids are further complicated by the half-life and the dispositional kinetics, *i.e.*, the distribution, metabolism, and excretion of the drug. Chiang & Hawks, *Implications of Drug Levels in Body Fluids: Basic Concepts*, in Urine Testing for Drugs of Abuse 80 (NIDA 1986). Given the amount of uncertainty surrounding the persistence of metabolites, the Court of Appeals was correct in concluding that

> although drug screening may not detect many drug users who abstain for the several days preceding the test, a particular user still faces a significant risk that his test would be positive. Finally, employees may not

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[32] The Union itself recognizes that "urine drug tests . . . can be reported positive for days and on occasion weeks after a drug was used." Pet. Br. at 30. Indeed, a study of the urinary excretion patterns of 86 chronic marijuana users examined after their last use demonstrated a mean excretion time of 27 days. Ellis, Mann, Judson, Schramm & Tashchian, *Excretion Patterns of Canabinoid Metabolites after Last Use in a Group of Chronic Users*, 38 Clin. Pharmacol. Ther. 572-78 (1985). Similarly, phencyclidine can be detected in urine from several days to several weeks after use. *Drug Testing Manual*, *supra*, at 3-32, 3-33. In fact, one reason for the use of urine as a specimen is that, an individual using drugs will test positive for the longest period of time on a urine test . . . . *Id.* at 2-23.

> be aware of the fadeaway effect. The risk of detection therefore may deter drug-using employees from seeking more sensitive positions [816 F.2d at 180].[33]

The Union's objections to the effectiveness of Customs' drug testing program amount, paradoxically, to an argument that the program *is not intrusive enough*. In order to be absolutely certain that a urine specimen has not been tampered with, the collection site person would need to observe—directly and closely—the act of urination. In order to prevent any attempt to avoid detection by temporary abstention, Customs would have to subject all tentative selectees for covered positions to surprise urine collection without notice, and without the time necessary to make a reasoned and voluntary decision to take the test. Customs apparently has decided, however, that it is worth risking a small incremental loss in effectiveness in order to preserve as much as possible the privacy of their employees. It should not be penalized for adopting such a balanced approach.

3. *The drug screening program is highly respectful of applicants' privacy interests.* The intrusion on individual privacy occasioned by Customs' drug screening program is no greater than is necessary to fulfill its purpose of detecting illegal drug use. *See O'Connor, supra*, 107 S. Ct. at 1503; *Schmerber, supra*, 384 U.S. at 767-68. First, under the program, urine samples are provided in a private bathroom or other facility designated solely for urine collection purposes. 53 Fed. Reg. 11980 (1988). There is no significant risk that other employees will enter the facility while a urine

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[33] The New York City Correction Department has had a urine drug testing program for all recruits and for officers in cases where there was reasonable suspicion of drug use. Between January 1985 and September 1987, 213 out of 501 recruits, academy trainees and employees with indications of drug use tested positive although they had *advance notice* of the tests. Lambert, *Koch Orders Drug Tests for Correction Officers*, N.Y. Times, Sept. 17, 1987, at B1; Andrews, *Drug Testing on Way for Correction Officers*, UPI, Sept. 16, 1987.

sample is being provided. Second, the monitor does not directly observe the applicant while he or she is producing the urine sample. Instead, observation is " 'close' but not 'direct' " J.A. at 29.[34] Third, accommodations are made for applicants who find it difficult to provide urine samples at their scheduled times. Applicants who are unable to provide a sample within an hour's time period are permitted to return within a reasonable time. J.A. at 30.

Fourth, the drug screening program protects against disclosure of unnecessary information.[35] Urine samples may be tested only for certain, specified drugs. J.A. at 32; 53 Fed. Reg. at 11983. They may not be tested for unrelated conditions such as pregnancy or diabetes.[36] Finally, all test results are highly confidential. Employee records containing this information are maintained in accordance with the Privacy Act, 5 U.S.C. § 552a. *See* J.A. at 36; 53 Fed. Reg. at

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[34] *See Rushton, supra*, 844 F.2d at 566 (drug screening plan does not burden interest in urinating in private where it does not require someone to witness the employee urinate).

[35] Customs also has taken steps to ensure that pre-testing information supplied by applicants, *see supra* n. 29, is not disclosed unless necessary. This information is sealed in an envelope which is opened only if there is a positive finding. J.A. at 31. Even then, the information is used solely to determine whether the result is due to something other than the illegal use of drugs. J.A. at 33-34.

[36] Although a urine test for illicit drug use may sometimes disclose the presence of certain drugs used to treat a medical condition such as epilepsy, it *will not* automatically reveal medical conditions such as pregnancy, diabetes, heart disease or cancer. These conditions can be detected only by specific tests which are not performed under the Customs' program. *See* J.A. at 25, 32; 53 Fed. Reg. at 11983. Moreover, any results obtained by a laboratory which are not indicative of illegal drug use would not be reported back to the agency. Thus, the revelation of personal medical information clearly is not "a necessary byproduct of drug testing." Pet. Br. at 29.

11986. This Act provides extensive safeguards to protect the confidentiality of employee records. In addition, E.O. 12564 prohibits the use of drug testing for the purpose of gathering evidence for use in criminal proceedings. 51 Fed. Reg. at 32892. These factors demonstrate that the Customs drug testing program, as implemented under the HHS guidelines, is highly sensitive to the personal privacy of those persons required to be tested.

CONCLUSION

For the reasons stated above, *amicus curiae* College of American Pathologists respectfully requests that the judgment of the Court of Appeals be affirmed.

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AMICUS CURIAE

BRIEF

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NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Petitioners,
v.
WILLIAM VON RAAB, COMMISSIONER,
UNITED STATES CUSTOMS SERVICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE AMICUS CURIAE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1879

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Petitioners,

v.

WILLIAM VON RAAB, COMMISSIONER,
UNITED STATES CUSTOMS SERVICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE AMICUS CURIAE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC or Council) respectfully submits this brief as amicus curiae in support of the Respondent. The parties' written consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote sound approaches to the elimination of discriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including in-

dividual employers as well as several trade associations which themselves have hundreds of corporate members. The members of EEAC are committed firmly to the principles of nondiscrimination and equal opportunity in employment.

The Council's members, and the constituents of its trade association members, are deeply concerned about the problem of drug and alcohol abuse in the nation, and many have implemented programs addressing substance abuse in their workplaces. Often, these programs include drug and alcohol testing for both applicants and current employees. Many of these programs, in fact, use the same test procedures and methodologies used by the Customs Service in its program at issue in this case.

As a representative of private sector employers, EEAC has a direct and substantial interest in this case, even though its members are not subject to the Fourth Amendment. Any guidance this Court may provide as to the meaning of the concept of cause as applied to drug testing is likely to influence how this key concept is applied to private sector employers.

For example, several states have enacted legislation barring private sector employers from requiring drug tests in the absence of some degree of cause.[1] Also, many EEAC members have collective-bargaining relationships with unions which are regulated under the National Labor Relations Act, 29 U.S.C.

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[1] *See, e.g.*, Conn. Pub. Act No. 87-551 (1987); Iowa Code § 730.5 (1987); 1987 La. Act 464; Minn. Stat. § 181.950 *et seq.* (1987); Mont. Code § 39-2-304 (1987); R.I. Gen. Laws § 28-6.5-1 (1987); Utah Code § 34-38-1 (1987); and 1987 Vt. Act § 61.

§ 141 *et seq.* (1982) (NLRA), and sometimes by the Railway Labor Act, 45 U.S.C. § 151-88 (1982) (RLA). In many instances, these agreements address the issue of substance abuse testing, and in evaluating the propriety of substance abuse programs under these agreements, arbitrators sometimes rely upon constitutional concepts.[2] Moreover, in *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, the Ninth Circuit recently read Fourth Amendment privacy protections into a union's relationship with a private sector employer.[3] In sum, because constitutionally-derived concepts permeate regulation of substance abuse testing in the private sector, the Court's decision in this case is likely to have considerable influence on the testing programs used by EEAC's members and other private sector employers.

Because of its interest in the issues associated with substance abuse, EEAC, through a closely related foundation funded by its members, sponsored the preparation of a monograph titled *Drug and Alcohol Abuse: A Guide to the Issues* by J. Michael Walsh, Ph.D. and Stephen C. Yohay, published in 1987 by the National Foundation for the Study of Equal Employment Policy. In addition, EEAC filed an amicus curiae brief in support of the petition for a writ of

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[2] *See, e.g., Shell Oil Co. v. Oil, Chemical and Atomic Workers International Union*, 84 LA 562, 565 (BNA) (1985).

[3] *Burlington Northern*, 838 F.2d 1087, is currently on a petition for a writ of certiorari with this Court (No. 87-1631). In its decision, the Ninth Circuit, unexplainably, "decline[d] to assume that [the union] implicitly granted [Burlington] the authority to invade [employees'] privacy in ways the government could not." *Id.* at 1093.

certiorari in *Burlington Northern Railroad Co. v. Brotherhood of Locomotive Engineers, supra.* More generally, as a broadly-based national organization, EEAC has filed many amicus briefs with this Court. Some of these cases include *Watson v. Fort Worth Bank & Trust* (No. 86-6139) (decision pending); *School Board of Nassau County v. Arline,* 107 S. Ct. 1123 (1987); and *Connecticut v. Teal,* 457 U.S. 440 (1982).

STATEMENT OF THE CASE

The United States Customs Service (Customs) requires current employees who are seeking promotions to "sensitive" positions—such as drug interdiction or jobs that involve the carrying of firearms or access to classified information—to submit to a test for the use of illegal drugs. Even though Customs does not have "individualized suspicion" that a particular applicant has used drugs, and even though Customs is admittedly "largely drug free," the Service bases its drug testing policy on the belief that workers who use drugs are particularly subject to bribery and blackmail, and that the use of drugs is a serious national problem.

Customs, like many other employers, provides significant procedural safeguards in conducting the actual tests, and attempts to minimize their intrusiveness. For example, applicants are given advance notice of the test, are afforded an opportunity to account for prescription medication, and are permitted to produce the sample outside the direct observation of the monitor. In addition, a strict chain-of-custody is followed, and every sample that tests positive under the initial test is tested again by GC/MS (gas chromatography/mass spectrometry)—a procedure that ensures an accurate result. The National Treasury

Employees Union (NTEU), however, sought an injunction against the implementation of the program.

The district court ruled that the program was unconstitutional because it violated the Fourth Amendment's protection against unreasonable searches and seizures, the Fifth Amendment's protection against self-incrimination, and the right to privacy found in the Constitution's penumbra. *National Treasury Employees Union v. Von Raab,* 649 F. Supp. 380 (E.D. La. 1986). In doing so, the court also ruled that initial and confirmatory testing procedures were so "fraught with the dangers of false positives as to deny the Customs workers due process of law." *Id.* at 390.

The Fifth Circuit, however, reversed that decision, ruling that even though the test constitutes a "search,"[4] it is not "unreasonable." 816 F.2d 170, 173. In doing so, the court stated that the following factors, among others, made Customs' program reasonable: 1) that Customs attempted to minimize the intrusiveness of the search; 2) that Customs has a demonstrated need for its program given the pernicious impact of drugs on society; 3) that the sample is taken in the most private facility practicable; 4) that the test is voluntary in the sense that only applicants must submit; 5) that Customs has responsibilities as an "employer of private citizens"; 6) that less-intrusive measures were considered; and 7) that Customs' program is effective, primarily because drug users may choose not to seek sensitive positions. *Id.* at 177-180. The Fifth Circuit accordingly reversed the decision of the district court, also holding that the testing program does not violate the

[4] This brief does not address the issue of whether the Customs' program constitutes a "search or seizure."

privilege against self-incrimination, due process or the penumbral right to privacy—holdings that NTEU does not directly attack on appeal.

SUMMARY OF ARGUMENT

In *O'Connor v. Ortega*, 107 S. Ct. 1492, 1503 (1987), the Supreme Court held that a government employer's search of its employees must be both reasonable at its "inception" and reasonable in its "scope." This Court should hold that a drug testing program, like the one adopted by the Customs Service herein, can be reasonable at its "inception" even if supervisors do not have "individualized suspicion" that a particular employee is working under the influence of a drug. Such a holding is justified because national statistics reveal such high incidents of on-the-job use and impairment, that there is reason to believe that a test will "turn up evidence . . . of work-related misconduct." *Id.* at 1503. Moreover, a drug test can be justified as part of a "work-related" purpose—to maintain "supervision, control and the efficient operation of the workplace." *Id.*

A drug testing program need not be limited to cases of individualized suspicion to be reasonable at "inception," particularly for these Customs workers. First, Customs did not establish its testing program in its capacity as a "law enforcement" agency, but rather in its capacity as an employer, a context in which the search standard is relaxed. *Id.* at 1499. Second, as this Court in *O'Connor* made clear, an employer is responsible for confronting the "realities of the workplace," *id.* at 1500, which, for Customs, includes the anticipation and prevention of a myriad of safety and security disasters. Third, other means of drug detection—such as background investigations

and supervisor observation of workplace performance —will not be as effective as Customs' testing program. Moreover, Customs' program is reasonable in its "scope" because Customs undertook significant safeguards to limit the intrusiveness of the test itself.

Even if this Court decides to require individualized suspicion for workplace drug testing, its decision should nevertheless ensure that employers will be able to use the effective and reliable test procedures and confirmatory testing assays that Customs used in this case. In addition, even if this Court requires individualized suspicion, such a standard should be "reasonable suspicion," not probable cause, primarily because it is "unrealistic to expect supervisors . . . to learn the subtleties of the probable cause standard." *Id.* at 1502. Finally, even if this Court requires individualized suspicion for most jobs, it still should permit the periodic testing of workers in "high risk" and "safety sensitive" occupations. *See, e.g., McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987).

ARGUMENT

I. AN EMPLOYER'S RIGHT TO TEST EMPLOYEES AND/OR JOB APPLICANTS FOR ILLEGAL DRUG USE SHOULD NOT BE DEPENDENT ON ITS HAVING INDIVIDUALIZED SUSPICION THAT A PARTICULAR EMPLOYEE IS WORKING UNDER THE INFLUENCE, EVEN WHERE THE EMPLOYER IS A GOVERNMENT ENTITY SUBJECT TO THE FOURTH AMENDMENT

A. To Be Lawful, A Government Employer's Program Need Only Be Reasonable At Its Inception And In Its Scope

The Fourth Amendment requires searches by the government to be "reasonable." This Court has ruled

that to determine whether a search is reasonable requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983); *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967). In the workplace context, the seminal case of *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987) (plurality opinion) made clear that this balancing must include the weighing of "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *Id.* at 1499. In *O'Connor*, this Court went on to hold that:

> *public employer intrusions* on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, *should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable.*" *Id.* at 1502-03 (emphasis supplied).

This two-fold inquiry, "reasonable at inception" and "reasonable in scope," therefore, serves as the starting point for determining the legality of Customs' drug testing program. As we show below, because of Customs' need to maintain "supervision, control and the efficient operation of [its] workplace," *id.* at 1499, its program is reasonable under both grounds—and this Court should rule that an employer need not always have "individualized" suspicion in order to meet that standard.

B. Because Statistics Show That Drug Abuse Is A Serious National Problem In The Workplace, It Can Be Reasonable "At Inception" For An Employer To Institute A Periodic Drug Testing Program Without Having Individualized Suspicion

The NTEU, in its Petition for a Writ of Certiorari at 13, makes the incredible contention that "the proliferation of drug testing programs comes at a time when studies show a general decline in the use of illegal drugs in the population at large." Going on to characterize Customs workers as an "innocent population," and maintaining that "99.99% of those searched have been innocent," NTEU Br. at 26, 27, the union implies that Customs—and by implication other employers—have little to fear about the so-called drug epidemic.

Clearly, the statistics are to the contrary: drug use in the nation and the workplace is pervasive. For example, the 1985 National Household Survey on Drug Abuse compiled by the National Institute on Drug Abuse (NIDA) reported that 19% of all Americans over twelve years of age had used an illicit drug in the last year. *1985 National Household Survey on Drug Abuse*, NIDA Capsule, National Institute on Drug Abuse (October, 1986), *cited in Notice Of Proposed Rulemaking*, FAA Anti-Drug Program, 53 Fed. Reg. 8368 (March 14, 1988). Another study estimates that the number of occasional or regular users of illicit drugs ranges from 500,000 hard-core heroin addicts and approximately 20-25 million people who reportedly have tried cocaine, to more than 60 million who reportedly tried marijuana.[8]

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[8] *Corporate Strategies for Controlling Substance Abuse*, The Conference Board, Inc., Report No. 883 (1986). The

Particularly alarming for employers are data from the NIDA Household Survey indicating that in the 20-40 year old population—those currently entering the workforce—65 percent have used illicit drugs, and 42 percent of those studied have done so within the last year. Among employed 20-40 year olds, 29% reported use of an illicit drug in the past year, and 19% reported some illicit drug use at least once in the past month. *Id.*

In fact, in a poll conducted by a Cocaine National Help Line in New Jersey, 75 percent of 227 drug users admitted to using illegal drugs *on the job*; 64 percent said that the drugs interfered with their work performance; 44 percent stated that they *sold* drugs to other employees; 18 percent admitted to having had a drug related accident; and 18 percent admitted that they had *stolen* from their employers to support their drug habits. Masi and O'Brien, *Dealing with Drug Abuse in the Work Place*, Business and Health 29 (December, 1985). Moreover, drug use has had a deleterious economic effect on business in a number of ways. Most obvious are the manifest direct costs of, for example, paying for treatment of substance abuse through health care and rehabilitation.[6] Other indirect costs include ab-

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report goes on to reveal that during each of the past few years, 6 tons of heroin, 50 to 75 tons of cocaine, and as much as 10,000 tons of marijuana—some of it escaping detection by the Customs workers at issue herein—have been consumed annually in the United States.

[6] Substance abusers appear to be high-cost consumers of health care, typically with repeated rather than one-time hospital confinements. A study of six leading hospitals in Boston, for example, revealed that 13 percent of the patients used as many resources as the remaining 87 percent, and these patients' records "showed more evidence of drinking, smoking, and obesity." D. Walsh, *Direct and Indirect Costs to Industry*, Corporate Strategies at 12, citing J.A. Califano, *The 1982 Report on Drug Abuse and Alcoholism* (1982). *See also* W.N. Burton, P.R. Eggum, and P.J. Keller, *High Cost of Employees in an Occupational Alcoholism Program*, Journal of Occupational Medicine at 259-262 (April, 1981).

senteeism, productivity loss, employee turnover, waste and accidents.[7] In fact, the Fifth Circuit below noted that "[e]mployee drug use costs the United States an estimated $33 billion per year." 816 F.2d at 173. In short, the workplace drug problem is a serious and growing problem for employers throughout the nation—and NTEU's contentions to the contrary are misplaced.[8]

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[7] In the monograph *Drug and Alcohol Abuse in the Workplace: A Guide to the Issues*, the authors also reference the "latent indirect costs" to companies (those associated with damage to corporate image and employee morale):

> The costs of bad decisions, diverted and unproductive supervisory and managerial time, damage to equipment and products, and disciplinary and grievance actions are difficult to quantify. Also, there is reason to be concerned about the costs which may result from potential employer liability for substance abuse problems arguably caused by job-related stress.

Id. at 8 (footnote omitted).

[8] NTEU argues that "[r]eferences to the extent of illegal drug use in society at large cannot suffice to establish reasonable grounds to believe that drug use will be found among current Customs employees, particularly those who have competed and been selected to receive promotions." NTEU Br. at 44-45 n.22. Moreover, NTEU argues that while the "extent of illegal drug use in our society has appropriately received increased attention in recent years as a serious law enforcement problem, for the most part, the number of users is declining." *Id.*, citing National Institute on Drug Abuse,

Moreover, the Customs workers herein present an even greater danger than do most other workers. As the Court below stated:

> The use of illicit drugs has had a pernicious impact on American society. It significantly compromises the public's health, safety, and security. Drug smuggling has become an increasingly sophisticated enterprise, posing a formidable challenge to law enforcement. Moreover, the lucrative rewards for success provide a continuing temptation to engage in the unlawful enterprise. . . . *Use of controlled substances by employees of the Customs Service may seriously frustrate the agency's efforts to enforce the drug laws. An employee's use of the substance he has been hired to interdict casts substantial doubt upon his ability to carry out his duties honestly and vigorously, and undermines public confidence in the integrity of the Service.*

816 F.2d at 177-78 (emphasis supplied). Alarmingly, the Fifth Circuit went on to note that drug dealers may also subject a Customs worker who uses drugs to blackmail, and that the "drug user may be tempted to divert for his own use portions of drug shipments that are seized." *Id.* In addition, "those employees involved in field operations, particularly

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"Highlights of the 1985 Household Survey on Drug Abuse" (Nov. 1986), pp. 2-4.

First, the NTEU, rather disingenuously, attempts to use "national" figures in order to show that that workplace drug abuse is declining, yet argues that employers should not be able to use similar statistics to rebut that contention. More importantly, a close reading that NIDA study reveals a 38% *increase* (from 1982-85) in the use of cocaine—one of the drugs these Customs workers will be hired to keep out of the country.

if carrying firearms, endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use." *Id.*

In *O'Connor*, this Court explained two ways in which a search can be "justified at its inception": there either can be "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of *work-related misconduct*, or that the search is necessary for a non-investigatory *work related purpose*." 107 S.Ct. at 1503 (emphasis supplied). Given the sobering statistics of workplace drug abuse and on-the-job impairment cited above, it is likely that drug testing will "turn up evidence" of illegal drug use, a clear justification for a search. Moreover, it is obvious that Customs also has a "work related purpose" in ferreting out drug use by the same workers hired to keep drugs out of the country, another justification for its program. *See, e.g., Mack v. United States* 653 F. Supp. 70, 75 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 120 (2d Cir. 1987) ("FBI has a compelling interest in assuring that its agents are not involved in drugs").[9]

Even more importantly, this Court in *O'Connor* stated that there is a plethora of "other types of employer intrusions"—besides the "work-related searches" and "investigation of work-related employee misconduct" considered in *O'Connor*—in which employers should be permitted to search. *Id.* at 1501. Significantly, the Court implied that some of these searches should be under an even lesser standard,

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[9] Moreover, as recognized by the Third Circuit, "a police officer," like a Customs worker, "violates the laws he is sworn to enforce by the very act of using illegal drugs." *Copeland v. Philadelphia Police Dept.*, 46 FEP 272, 279 (3d Cir. 1988).

not necessarily requiring "individualized suspicion." *Id.* at 1503. This case presents such a situation. Indeed, this Court should adopt the rule that, given the serious national problems posed by workplace drug abuse and its devastating effects on the workplace, it can be reasonable "at inception" for an employer to institute a drug testing program without necessarily having individualized suspicion. *See American Fed. of Government Employees v. Dole*, 670 F. Supp. 445 (D.D.C. 1987).

C. A Rule Permitting Some Testing Without Individualized Suspicion Is Especially Appropriate Where, As Here, The Employer Is Not Acting In A Law Enforcement Capacity, Where The "Realities Of The Workplace" Require A Drug-Free Work Environment, And Where Other Means Of Detection Will Not Be As Effective As Periodic Drug Tests

A rule permitting drug screens absent individualized suspicion is especially appropriate in the instant case. First, Customs herein is not acting in a "law enforcement" capacity when it gives a drug test. Rather, Customs (like many of EEAC's members) is acting as an "employer"; it is seeking to maintain "supervision, control and the efficient operation of the workplace." *O'Connor* at 1499. And, as this Court made clear, outside the "law enforcement" context, traditional " 'probable-cause requirement[s become] impracticable' " for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct. *Id.*, citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). This Court explained:

> *Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies*

> *inevitably suffers from the inefficiency, incompetence, mismanagement or other work-related misfeasance of its employees.* Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe. In contrast to law enforcement officials, therefore, public employers are not enforcers of the criminal law; instead, *public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner. Id.* at 1502. (Emphasis supplied).

In addition, the "realities of the workplace," *O'Connor* at 1500, militate against an individualized suspicion requirement. For the Customs Service, such a "reality" means making sure that no employee who is involved in a sensitive operation is using drugs. *See, e.g., Mullholland v. Department of Army*, 660 F. Supp. 1565, 1570 (E.D. Va. 1987) (describing its facts as "closely on point" with those presented herein, the court permitted random testing of civilian employees in sensitive "dangerous and/or highly visible occupations, which involve the safety, well-being, and integrity of the public"). Another such "reality" is that employers are expected to investigate the fitness for employment of persons applying for a job, and that this investigation may, by law, sometimes require a drug test.[10] Similarly, it is an-

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[10] For example, federal contracting agencies are encouraged to assure that employees working on government projects are drug free. See Mandatory Guidelines for Federal Workplace Testing Programs, published by the National Institute on Drug Abuse, Department of Health and Human Services, 53 Fed. Reg. 11970, 11975 ¶ 21 (April 11, 1988) ("any agency

other workplace reality that many employers face the prospect of a lawsuit (such as one for negligence or negligent hiring) if an employer does not take positive steps to ensure a drug free work environment. *See Negligent Hiring Claims Take Off*, A.B.A. Journal (May 1, 1987). The court below stated that, as an "employer of private citizens . . . the government may exact from its employees what it may not require of others." 816 F.2d at 178. The Fifth Circuit below explained: "Government employees may be subject to searches or other restraints on their liberties that would be impermissible in the absence of the employment relationship so long as these requirements are reasonably aimed at assuring integrity and competence. Work-related searches that " 'are mostly incident to the primary business of [an] agency' may satisfy the fourth amendment's reasonableness requirement." *Id.*, citing *O'Connor* at 1500.

The NTEU, however, argues that there exist other less intrusive (but just as effective) means to detect drug use. The NTEU claims that one such means is through direct supervisor observation. This contention is simply unrealistic. As the Fifth Circuit made

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may require a contractor to test its own employees following the procedures in the Guidelines by making the requirement a term or condition of the contract.")

In addition, an amendment that would prohibit federal funds from being expended in any workplace which is not free from the illegal use of controlled substances was approved on May 17, 1988, by the House of Representatives. The amendment was offered by Representative Robert Walker (R-PA) to H.R. 4567, 100th Cong., 2d Sess. (1988), to the Energy and Water Appropriations bill, and probably will be attached to other bills.

clear, drug use is not always easy to detect just through supervisor monitoring:

> In this case, the alternative sources of information do not eliminate the need for urine testing. Although the Service has had an opportunity to observe the performance of employees while they were working in non-sensitive positions, this provides scant basis on which to evaluate their integrity and reliability should they be assigned to work in sensitive positions.

816 F.2d at 180. *See Mullholland*, 660 F. Supp. at 1569 (observation "provides little basis on which to assess drug-free reputation and reliability of applicants for sensitive positions").

Neither is it effective simply to conduct background investigations of the Customs applicants. *See* NTEU Br. at 35. As the Fifth Circuit noted, interviewees may be "reluctant to disclose their knowledge of the employee's drug use or may be unaware of his use, either because the employee has not disclosed this activity or because he has submitted names of only those references who do not know of his use." 816 F.2d at 180. Moreover, "background investigations are themselves intrusive invasions of an individual's privacy." *Id.* In fact, background investigations are less desirable as a means of detection because of the possibility of slander or libel claims where questions are asked about potential drug usage.

In fact, the most important element of the Customs program is its deterrent effect, a feature lacking in other detection devices. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Obviously, someone who uses drugs is less likely to apply for a job that requires a drug screen as a condition of employment. The

Fifth Circuit below noted that the "risk of detection therefore may deter drug-using employees from seeking more sensitive positions." 816 F.2d at 180. Given the importance of maintaining the integrity of the Customs Service, such a deterrent effect is justification enough to eliminate the need for any individualized suspicion requirement herein.[11]

D. Where Employers Limit The Intrusiveness Of The Search And Adopt Other Safeguards—As Did Customs Herein—The Drug Testing Program Is "Reasonable In Scope"

As this Court stated in *O'Connor*, "[t]he search will be permissible in its scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].'" 107 S. Ct. at 1503, citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). *See Bell v. Wolfish*, 441 U.S. at 559.

Clearly, the measures adopted by Customs are not "excessively intrusive." As noted by the Fifth Circuit, applicants are given at least five days written notice before any test is scheduled, and are not tested until they have passed the other requirements for transfer. Moreover, applicants are permitted to list any prescription medications before the test, and are not subject to adverse action if they decide not to pursue the application. The Fifth Circuit thus found:

---

[11] Arguments concerning the extent of the Customs workers' privacy interests (including those involving the "limited" nature of the intrusion and those that the Customs workers who applied for these safety sensitive jobs have a lower expectation of privacy) are addressed in other briefs, *see* Brief for Attorney General in Support of Motion to Stay at p. 31, and are not revisited herein.

> *The Service has attempted to minimize the intrusiveness of the search* . . . [T]he tester does not watch the employee while the urine sample is being produced. In addition, the screening . . . is not as intrusive as an invasion of bodily integrity or of the home, nor do employees suffer the indignity of either strip or body cavity searches.
>
> *The Customs Service program is also limited in total scope*, thereby preventing the exercise of discretion concerning who is to be tested . . . *The procedure therefore observes the requirement that, when searches are permitted in the absence of individualized suspicion, the government must employ safeguards to ensure that "the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"* . . . Under the Customs Service program, employees are protected from the abuses possible when government officials enjoy "almost unbridled discretion . . . as to when . . . and whom to search."

816 F.2d at 177 (footnotes omitted) (emphasis supplied). As a result, this Court should rule that where an employer adopts appropriate safeguards to limit the intrusiveness of the search, a drug testing program is limited in scope.

This Court, therefore, should hold that Customs' drug testing program was reasonable at its inception and in its scope. In so holding, this Court should adopt the rule that "individualized suspicion" is not a prerequisite to a finding of reasonableness.

II. EVEN IF THIS COURT REQUIRES INDIVIDUALIZED SUSPICION FOR PUBLIC SECTOR WORKPLACE DRUG TESTING, IT SHOULD ADOPT STANDARDS TO ENSURE THAT EMPLOYERS MAY COMBAT THE DRUG PROBLEMS WITH EFFECTIVE AND CURRENTLY AVAILABLE MEANS

A. Customs' Testing Procedures Are Appropriate And Effective, And Should Be Accepted By This Court

The Fifth Circuit below strongly rejected the district court's holding that Customs' drug testing procedures are so unreliable that they violate due process of law guaranteed by the Fifth Amendment. 816 F.2d at 181. The NTEU, however, will not let the fight over Customs' procedures die a natural death; the union instead seeks to transpose that Fifth Amendment debate into this Fourth Amendment inquiry. The NTEU, in fact, quotes the district court's finding that Customs' procedures are "degrading"—a *Fifth* Amendment finding, 649 F. Supp. at 388—in its Fourth Amendment attack. Br. at 21. The NTEU goes on to call Customs' testing procedures "frightening, embarrassing [and] offensive." *Id.*

To the contrary, Customs' procedures contain many safeguards adopted to ensure accuracy and confidentiality, a point noted by the Fifth Circuit below. 816 F.2d at 177. As a result, even if this Court recognizes an "individualized suspicion" requirement, it should adopt guidelines ensuring that employers may avail themselves of the same test procedures used herein by Customs.

First, Customs followed widely-recognized procedures for collecting urine specimens: it contracted with outside, private laboratory personnel that have

specific expertise. Many private employers believe that outside experts are better guarantors of chain-of-custody, documentation of the specimen custody, and transport to the contract laboratory. Many employers, in fact, keep their in-house medical staffs out of this process entirely, maintaining that it is contrary to good medical practice for them to be involved in providing medical diagnostic information to managers for use in making decisions about personnel actions.

In addition, Customs chose an appropriate location where the employees will be tested: the restroom. Such a choice represents a readily-available, adequate, and cost-effective resource for collection of the sample. The Fifth Circuit below, in fact, found that the restroom "is the most private facility practicable," 816 F.2d at 178, a finding readily endorsed by many companies. *See Mullholland*, 660 F. Supp. at 1569.

Another appropriate, and employee-sensitive, procedure undertaken by Customs was the manner in which the specimen collection was "certified." There simply is no question that the integrity of the sample is best assured by a "witnessed" collection. However, Customs did not impose this requirement. Instead, the tester stood outside the door to the stall and listened for the "normal sounds of urination." 816 F.2d at 174. In addition, as fully appreciated by the Fifth Circuit below, "the screening is scheduled in advance instead of by surprise, and employees are not tested until they have passed the other requirements for transfer to their new positions or have been tentatively approved." *Id.* at 177 (footnote omitted).

Finally, Customs adopted appropriate "chain-of-custody" requirements. Chain-of-custody refers to a system which enables one to trace each step in the handling of a specimen from the donor through analysis and reporting of results. The purpose of a chain-of-custody procedure is to guarantee that the specimen which arrives at the lab for assay is in fact the product of the individual whose name appears on the label, that it has not been tampered with in transport, and that all persons who handled the sample can be identified. Customs properly documented and secured each sample in a manner adhered to by many private sector companies.

Because the test procedures used by Customs are appropriate and effective, they should be approved by this Court. Indeed, many of these procedures are the same or similar to ones used by private sector employers.

B. This Court Should Rule That The Screening Assay (EMIT/GCMS) Used By Customs—And By Other Employers—Is Sufficiently Reliable

The district court below ruled that Customs' use of EMIT (Enzyme Multiplied Immunoassay Technique) for the initial test—or "assay"—and GC/MS (gas chromatography/mass spectrometry) as a confirmatory assay were "so fraught with the dangers of false positives as to deny the Customs workers due process of law." 649 F. Supp. at 390. While the Fifth Circuit reversed this finding, 816 F.2d at 181, the NTEU still argues that this screening methodology is "imprecise," Cert. Pet. at 3, and that it provides "cause[for] concern," Br. at 10. This Court should strongly endorse this screening methodology

as a sufficiently reliable, indeed the best available, procedure.

The mass spectrometer is a highly sensitive and specific detection device. When coupled with a gas chromatograph, it provides the most accurate procedure available for the identification of drugs. It is extremely sensitive and specific, and can identify many components in a single analysis. In fact, this method has become the confirmation method of choice for all employers, both public and private. See *Drug and Alcohol Abuse in the Workplace* at 96.

Indeed, many courts regard confirmation by gas chromatography coupled with mass spectrometry (GC/MS)—the confirmatory test used by Customs—as the most rigorous technique of all. *See, e.g., Brotherhood of Maintenance of Way Employees v. Burlington Northern*, 802 F.2d 1016, 1019 (8th Cir. 1986) (GC/MS "is considered to be the most accurate [testing procedure] available"); *Williams v. Secretary of Navy*, 787 F.2d 552, 555 (Fed. Cir. 1986) ("The GC/MS test is generally considered the most accurate test available to the scientific community"); *National Federation of Federal Employees v. Weinberger*, 640 F. Supp. 642, 648 (D.D.C. 1986) (same), *rev'd on other grounds*, 818 F.2d 935 (D.C. Cir. 1987), *on remand*, 46 EPD ¶ 37,855 (1988); *Jones v. McKenzie*, 628 F. Supp. 1500, 1507 (D.D.C. 1986), *rev'd in part on other grounds*, 833 F.2d 335 (D.C. Cir. 1987), *cert. filed* (No. 87-1706) (April 15, 1988) (EMIT must be confirmed by GC/MS or other alternative process). *See* Amicus Brief of Pharm-Chem Laboratories, Inc. in the Fifth Circuit below at pp. 26-34.

EEAC's member companies, along with other private sector companies, strongly endorse the use of

such a testing methodology in most circumstances. In fact, at a recent federally-sponsored meeting which brought together representatives of more than 300 major corporations and several major labor unions to discuss approaches to drugs in the workplace, the following consensus statement was reached and adopted with regard to confirmatory testing:

> For those situations where the ultimate sanction is termination or denial of employment or the benefits of employment, it should be mandatory that samples be analyzed by those methods and by those laboratories which will assure an accurate chemical result. Positive urinalysis results should always be confirmed by an alternate methodology to that used for the initial screen.

J.M. Walsh & S.W. Gust (eds.), *Consensus Summary: Interdisciplinary Approaches to the Problem of Drug Abuse in the Workplace*, U.S. Department of Health and Human Services, DHHS Pub. No. (ADM) 86-1477 (1986).

Accordingly, this Court should rule that confirmatory testing methodologies (particularly those using GC/MS) are reliable, accurate and appropriate for employer drug testing programs.

C. If This Court Adopts An Individualized Suspicion Requirement, That Standard Should Be One Of "Reasonable Suspicion" Not "Probable Cause"

As argued above, this Court is requested to sanction a testing program that does not require individualized suspicion. However, should this Court adopt an individualized suspicion standard, that standard should require supervisors to have "reasonable suspicion," not "probable cause."

This result is necessary, first of all, because "[i]t is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard." *O'Connor* at 1502. NTEU claims that Customs workers "by virtue of the mission of their agency, understand the 'niceties' of the probable cause standard," Br. at 36. But even if, arguendo, Customs *law enforcement* personnel understand probable cause, the many *administrators* who are covered by the program simply do not have such training. See Pet. 2-3 n.1; Op. Cert. at 2 n.1.; *see also T.L.O.*, 469 U.S. at 341-43 (school authorities do not need probable cause; rather the standard should depend on "reasonableness").

Moreover, as noted by this Court in *O'Connor*, supervisors are not necessarily testing for drugs "to gather evidence of a criminal offense." *Id.* at 1502. Rather, most supervisors are trying to detect drug abuse to ensure "that their agencies operate in an effective and efficient manner." *Id.* A reasonable suspicion requirement, not a probable cause requirement, therefore, is the more appropriate standard. *See T.L.O.*, 469 U.S. at 353.

D. Even If This Court Adopts An Individualized Suspicion Requirement, It Should Carve Out An Exception For Periodic Testing For Workers In Safety Sensitive Occupations

Should this Court rule that government employers must have individualized suspicion before they can test most workers, this Court still should permit the testing of "high risk" or "safety sensitive" workers under a less rigorous standard. *See, e.g. McDonell v. Hunter*, 809 F.2d 1302, 1308 (8th Cir. 1987) (random testing of prison guards is reasonable).

Such a result is especially important for those employers who face the risk of loss of life, serious injury or extensive property damage should an impaired employee cause an accident. *See, e.g., Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (mandatory drug testing of employees working around high voltage wires permitted).

Such a rationale, in fact, serves as the impetus behind the approach recently taken by the Department of Transportation for the testing of private sector employees subject to its regulation. For example, the Federal Aviation Administration, in its Notice of Proposed Rulemaking, 53 Fed. Reg. 8368, (March 14, 1988), stated that it intends to permit random screens for employees in "sensitive safety- and security-related jobs." Similarly, the Department of Transportation announced its intention to permit mandatory, random drug tests for some 120,000 private sector rail employees. Daily Labor Report No. 90 (BNA) (May 10, 1988) at A-8. *Cf. Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *cert. granted*, No. 87-1555 (June 6, 1988).

In addition, several states that have chosen to regulate workplace drug testing have adopted such an approach. For example, Connecticut requires employers to have "reasonable suspicion" in order to test most workers, but permits random testing for employees who serve in an occupation which has been "designated as a high-risk or safety sensitive occupation." Conn. Pub. Act No. 87-551 (1987). See Minn. Stat. § 181.950, *et seq.* (1987) (random testing permitted for "safety sensitive positions); Mont. Code § 39-2-304 (1987) (testing permitted for applicants in "hazardous work environments").

As a result, even if this Court adopts an individualized suspicion requirement for most government workers, it still should not rule out the option for employers of using periodic or random tests for those employees working in high risk or safety sensitive positions.

CONCLUSION

For these reasons, and those expressed by the Respondent, EEAC respectfully submits that the decision of the Fifth Circuit below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 86-1879

IN THE

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OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,

Petitioners,

v.

WILLIAM VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICI CURIAE OF PHARMCHEM LABORATORIES, INC. AND SYVA COMPANY IN SUPPORT OF RESPONDENT

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BRIEF AMICI CURIAE OF PHARMCHEM LABORATORIES, INC. AND SYVA COMPANY IN SUPPORT OF RESPONDENT

All parties have consented to the filing of this brief on behalf of PharmChem Laboratories, Inc. and Syva Company in support of the Respondent.[1]

INTERESTS OF AMICI CURIAE

This brief is submitted on behalf of *amici* PharmChem Laboratories, Inc. ("PharmChem") and Syva Company ("Syva"). PharmChem is the drug testing laboratory originally under contract with the Customs Service to analyze urine

[1] The consent of the Petitioners and the Respondent are being concurrently filed with the Clerk of Court in accordance with Rule 42(2) of the Rules of this Court.

specimens from the pre-promotion drug testing program at issue in this case.[2] Syva is the manufacturer of the EMIT tests, based on the enzyme immunoassay technique, that are used for the initial testing of urine specimens collected in the Customs Service program.

A. PharmChem.

PharmChem is one of the largest and oldest independent drug toxicological laboratories in the United States. The laboratory was founded in 1971 and is licensed for drug testing under the requirements of the federal Clinical Laboratories Improvement Act of 1967, as amended (42 U.S.C. § 263a (1988)).[3] During its 17 year operating history, PharmChem has conducted in excess of eight million urinalysis drug tests for hundreds of federal and state courts, drug abuse treatment centers, criminal justice agencies, and public and private employers throughout the United States. Currently, PharmChem tests approximately 850,000 urine specimens each year for some 300 clients, including private and public entities, at over 1,200 collection sites.

PharmChem has been selected by a number of state and federal agencies to provide urinalysis drug testing, in each instance after a rigorous selection process involving on-site inspections by medical and scientific experts retained by those agencies. In addition to its contract with the U.S. Customs Service, PharmChem has supplied drug testing services to the

[2] PharmChem held the contract from the program's beginning to November 30, 1987. Subsequent to the instant litigation, the contract was relet for competitive bidding, and another laboratory was selected on the basis of the sealed bids submitted.

[3] PharmChem is also licensed as a forensic toxicology or drug testing laboratory pursuant to applicable state law by the states of California, Minnesota, New York, Pennsylvania and Vermont.

Administrative Office of the U.S. Courts,[4] the U.S. Coast Guard, the U.S. Bureau of Prisons and the Veterans Administration.

B. Syva.

Syva is the diagnostics subsidiary of Syntex Corporation, a multinational pharmaceutical and health care company. Syva is the world's leading manufacturer of immunoassays for testing drugs of abuse and a leader in the development and manufacture of immunoassays and instruments that perform a wide variety of diagnostic tests, including those for the diagnosis of sexually transmitted diseases and for the measurement of therapeutic drug levels in blood. Syva was the first company to adapt immunoassay technology to measure drug levels and to make such technology available commercially to laboratories nationwide. Syva has had over 22 years of experience with the design and manufacture of immunoassay technologies.[5] Today, Syva markets its products in the U.S. and 35 other countries around the world.

[4] PharmChem has been the drug testing laboratory employed by the Administrative Office of U.S. Courts for the western United States since April 1984. During this period, PharmChem has tested approximately 461,000 urine samples submitted by federal probationers and parolees to ensure they remain in a drug-free condition. As in the Customs Service program, PharmChem was selected only after a rigorous competition among national laboratories, and has been retained annually after repeated on-site inspections and blind proficiency tests have confirmed its accuracy and reliability. Federal courts have consistently upheld challenges to the test results under this federal court drug testing program. *See, e.g., United States v. Bell*, 785 F.2d 640, 643 (8th Cir. 1985); *United States v. Penn*, 721 F.2d 762, 766 (11th Cir. 1983).

[5] Syva pioneered an immunoassay technology that enabled rapid measurement of drugs and other substances without the use of radioactivity, thus decreasing the risk to health care workers previously utilizing radioimmunoassays. During the Vietnam war, there was an increasing drug abuse problem among the military due to the ready availability of many drugs, most notably heroin. In 1970, Syva received a direct request from the White House to provide assays for drugs of abuse to help stem the tide of this growing drug problem. Within a week of the original request, Syva responded by making available to the military testing instruments and over 100,000 assays utilizing its new technology. This technology enabled the military to detect substance abuse among returning veterans so that rehabilitation could be provided before they returned home.

Syva developed the first "homogeneous" immunoassay which eliminated the need for extensive processing of samples and laborious pipetting and separating steps inherent in previously available assays. This assay technology was called the EMIT enzyme immunoassay technique. EMIT assays were developed for the monitoring of many key drugs in medical practice and then for detecting drugs of abuse in blood and urine. Syva has one of the world's largest arrays of therapeutic drug monitoring and drugs of abuse assays currently available. The EMIT assays for testing drugs of abuse are the mainstay of initial testing in the majority of clinical and forensic laboratories across the U.S. Syva's EMIT assays are now used more than 70 million times each year to test for the presence of drugs of abuse or their drug metabolites in urine samples, which use exceeds that of all other immunoassays combined.

C. The Customs Contract.

The federal contract from the U.S. Customs Service was awarded to PharmChem in 1986, after a nationwide solicitation for sealed bids from various testing laboratories in the industry. The Customs Service retained an independent technical advisor to inspect and evaluate PharmChem prior to its selection and to assist in promulgating the detailed requirements for the drug testing program implemented in the Customs Directive of August 11, 1986.

From the program's inception to November 30, 1987, PharmChem tested 2,462 specimens for the Customs Service using Syva's EMIT tests for the initial testing. Positive initial test results were required to be confirmed using another technology known as gas chromatography/mass spectrometry ("GC/MS"). Of the 2,462 specimens, 37 were confirmed

positive for some type of drug or drug metabolite.[6] No notice of any "false positive" findings or report was ever given to PharmChem by the Customs Service or any person tested under the program.

D. The Interests of Amici in this Case

The professional reputations and financial futures of both PharmChem and Syva will be directly impacted by the Court's ruling in this case. Questions about the accuracy and reliability of testing technology are frequently intertwined in arguments against drug testing. Thus, any conclusions by the Court regarding the soundness of the testing technology and procedures at issue here will significantly affect other contracts currently held by PharmChem and, indirectly, by Syva and will have a substantial bearing on the ability of these *amici* to provide drug testing services and reagents in the future. Moreover, the Court's ruling will undoubtedly affect the ability of other federal agencies to implement their own drug testing programs, since the technologies and procedures involved herein are common to virtually all federal drug testing programs. *See, e.g.*, Exec. Order No. 12,564, 3 C.F.R. 224 (1987) and 53 Fed. Reg. 11,970 (1988).[7]

E. Issue Addressed by Amici.

This brief addresses only one issue: whether the drug testing technology used in the Customs Service program, when coupled with the other procedural safeguards the Customs

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[6] These 37 positive samples included a number of blind proficiency samples which contained known drugs or drug metabolites to ensure the laboratory was performing adequately. *See* Section V below; *cf. Hearings on FY 1989 Appropriations Before the Senate Subcomm. on Treasury, Postal Service, and General Government Appropriations*, February 26, 1988, p. 68 (unpublished transcript) (testimony of Customs Service Commissioner William von Raab).

[7] The integrity of the federal workforce has been of paramount importance to President Reagan, who, in September, 1986, signed Executive Order No. 12,564, entitled "Drug-Free Federal Workplace". Exec. Order No. 12,564, 3 C.F.R. 224 (1987). The order directed all agency heads to develop programs to test "for the use of illegal drugs by employees in sensitive positions," *id* at 226, and condemned the use of illegal drugs on or off duty. *Id.* at 225. *See also* Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970-89 (1988).

Service employs, provides an effective means of detecting illegal drug use by the individuals so tested.[8]

STATEMENT OF FACTS

One of the Customs Service's top priorities is the interdiction of narcotics smuggling. As sound policy dictates, the Customs Service has long forbidden its employees to use the very drugs they are employed to intercept. Pet. App. 3a. As one means of enforcing that requirement, the Customs Service in 1986 implemented a urinalysis drug testing program for Customs employees tentatively selected for transfer to positions that (1) directly involve the interdiction of illicit drugs, (2) require the carrying of a firearm, or (3) involve access to classified information. *Id.* (The program also applies to non-Customs applicants who are tentatively selected to be hired for these positions; however, Petitioners National Treasury Employees Union and Argent Acosta ("Petitioners") have not challenged the program as it applies to such outside applicants. *Id.* at 3a, 21a.)

At the test site, a collector gives the employee a form on which he may list any medications he has taken or any other legitimate reason for exposure to potentially illegal drugs in the preceding 30 days. The form is kept in a sealed envelope that will not be opened unless the urine test is confirmed positive. *Id.* at 4a.[9]

[8] Because this brief will address a number of scientific and technical concepts, the *amici* have developed a glossary of the special terms used in this field of forensic toxicology. The glossary is attached as Appendix A to this brief.

[9] It should be noted that pursuant to Section 1.1(b) of the Mandatory Guidelines for Federal Workplace Drug Testing Programs, which were issued by the U.S. Department of Health & Human Services on April 11, 1988, any agency with a drug testing program in existence as of September 15, 1986 must comply with the new mandatory guidelines within 90 days of their effective date. 53 Fed. Reg. 11,970 at 11,979. Thus, the Customs Service will be required to make some adjustments in its procedures to comply with those guidelines. For purposes of this brief, however, PharmChem and Syva refer only to the procedures which were part of the record below and which formed the basis for the District Court's and Court of Appeals' decisions.

The procedure requires the employee to relinquish all outer garments such as coats and jackets and any personal belongings. The collector gives the employee a sample bottle and the employee produces the urine specimen inside a restroom stall. In the interest of employee privacy, the collector is instructed not to observe directly the employee's urination. To deter tampering, the collector stays in the restroom to collect the specimen immediately upon the employee's leaving the stall. The collector is also instructed to reject an unusually hot or cold sample, which may indicate a substitution has been attempted. *Id.*

The Customs Service adheres to strict chain-of-custody procedures after collection. The collector applies a tamper-proof seal to the bottle, the employee initials a label affixed to the seal and signs a chain-of-custody form, and the collector signifies that the procedures have been correctly followed. *Id.* at 4a-5a. Thus, there is a double verification procedure at the time of collection, requiring both the employee and the collector to certify that the urine within a given sample bottle was given by that employee. The collector then seals the sample in a bag together with other samples and sends the bag by overnight courier to the laboratory where both a tracking system and chain-of-custody record are maintained. *Id.*

The urine specimens are tested only for marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP).[10] *Id.* at 5a. Initially, all specimens are tested using the appropriate

[10] There is a frequent misperception that urine *drug* tests will reveal to the employer personal information about an employee beyond whether that employee has any of these particular drugs in his urine (*e.g.*, that the tests may show an employee is under treatment for depression or epilepsy, is suffering from diabetes, or, in the case of a female, is pregnant). *See, e.g.*, Petitioners' Brief at 11, 29. Such concerns are without any factual basis. First, testing for drugs of abuse by means of EMIT confirmed by GC/MS does not reveal any such personal information, and it appears Petitioners have confused *other* urine tests, intentionally or unintentionally, with these very narrow and specific tests. Indeed, none of the EMIT assays for testing drugs of abuse used in the Customs Service program is even capable of detecting the presence of chemicals that would reveal such conditions. Second, a testing laboratory only reports to the employer that information which has been requested specifically. As Petitioners concede, "[t]he Customs program does not, of course, call for the testing of samples for pregnancy or psychiatric or other medical disorders." *Id.* note 23, at 29.

EMIT tests for these five drugs.[11] *Id.* The EMIT tests use specific antibodies to detect the presence of drugs and/or drug metabolites in urine. For each EMIT assay, any drug present in urine competes with enzyme-labeled drug for binding sites on an antibody. The drug present in urine displaces enzyme-labeled drug from the binding site and causes more enzyme to remain active. The level in enzyme activity thus corresponds to the amount of drug or metabolite present in a urine specimen. J.A. 104-105.

If a positive reading occurs, a second portion of the urine specimen is tested using an entirely different testing methodology, gas chromatography/mass spectrometry ("GC/MS"). Pet. App. 5a. The GC/MS procedure utilizes both the physical and chemical properties of the drug or drug metabolite to be identified.

GC/MS is the ultimate method of choice in forensic toxicology for the unequivocal identification of chemical compounds. This procedure is recognized as the state-of-the-art technology and, when properly administered, is 100% accurate for chemical, drug or drug metabolite identification. J.A. 105.

A positive test report is issued by the laboratory only after *both* the EMIT and GC/MS tests have confirmed the presence of a drug or drug metabolite above an administratively defined cutoff level. J.A. 32, 50. The confirmed testing program thus requires that two separate testing procedures, each based on a different analytical principle, be conducted to serve as a built-in double check to assure accurate test results.

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[11] These EMIT tests are regulated by the Federal Food and Drug Administration (FDA) as medical devices. *See* Federal Food, Drug and Cosmetic Act § 510(k), 21 U.S.C. § 360 (1988). As such, Syva obtains FDA clearance prior to marketing an EMIT test. 21 C.F.R. §§ 807.81, *et seq.* (1987). The manufacturing establishment is registered as required by the FDA and is subject to Good Manufacturing Practices (GMPs) for medical devices. 21 C.F.R. §§ 807.20, *et seq.*; 21 C.F.R. § 820 (1987). Pursuant to such GMPs, the manufacturing establishment is subject to inspection by the FDA. 21 U.S.C. § 374 (1988). Every EMIT drug testing product has performance specifications that must be met before any lot of EMIT drug testing reagents can be released for commercial sale. The documentation upon which such release is based is also subject to inspection by the FDA. 21 C.F.R. §§ 820.180, *et seq.* (1987).

Confirmed positive specimens are frozen and retained. J.A. 32. The Customs Service program provides that if the test result is positive, an employee may designate a laboratory of his choice to test the original specimen independently. Pet. App. 5a. The employee is thus provided with an opportunity to rebut the positive test report if he contests the results.

Finally, the Customs Service program includes a quality-assurance feature. Blind proficiency samples are intermingled with those of the employees to measure the incidence of false-positive and false-negative results. Quality assurance reports are provided to the National Treasury Employees Union. Thus, if the quality-assurance program indicates that false-positive results occur, employees may challenge the validity of their own positive tests on that basis. Pet. App. 21a.

In the proceedings below Petitioners did not offer any evidence to challenge PharmChem's performance as a testing laboratory. Nor did Petitioners allege any errors in PharmChem's reported test results on the urine specimens it analyzed under the Customs Service program. Petitioners also failed to present any credible evidence to refute specifically the reliability and accuracy of urinalysis drug testing to detect drugs in urine, where specimens are initially tested by an EMIT test and then confirmed by GC/MS before a positive result is reported, as is done in the Customs Service program.[12]

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[12] Not one of Petitioners' three expert witnesses addressed the reliability or accuracy of urinalysis results when GC/MS is used to confirm an initial positive immunoassay result. *See* Affidavit of John P. Morgan, M.D., J.A. 59-62; Affidavit of Dr. Arthur J. McBay, J.A. 63-67; Affidavit of David J. Greenblatt, M.D., J.A. 68-71. Moreover, the reservations these experts expressed about drug testing programs were generalized and speculative; none of the experts specifically addressed the methodology and procedural safeguards employed in the Customs Service program. For example, Dr. McBay recited a litany of factors important to determining the reliability of a "generic" testing program. J.A. 65. Petitioners never offered *any* evidence, either through Dr. McBay or any other witness, to establish that the Customs Service program fails to satisfy Dr. McBay's suggested criteria. Petitioners thus failed to meet their burden of producing sufficient evidence to support a finding that the drug testing methodologies employed by the Customs Service program are unreliable.

SUMMARY OF ARGUMENT

The Customs Service pre-promotion drug testing program utilizes state-of-the-art methodologies and carefully drawn procedural safeguards which provide a highly effective means of detecting illegal drug use. The urine samples collected are initially tested by Syva's EMIT tests, which rapidly and reliably distinguish negative specimens from those that are positive. Knowledgeable experts within the scientific community have long acknowledged that enzyme immunoassays such as EMIT are accurate and can be effectively and properly used to test for drugs of abuse.

To enhance the reliability of the initial test results, the Customs Service program requires that any positive EMIT test result be confirmed by GC/MS, the state-of-the-art, most conclusive method of confirming the presence of drug or drug metabolites in urine. The use of this confirmatory test enhances the reliability of the reported results to such a degree that, assuming proper handling of the specimens, a reported positive identification of a drug or drug metabolite in a specimen is virtually 100% accurate.

The combined use of the EMIT and GC/MS tests is widely accepted as the most accurate and reliable drug testing procedure available. As demonstrated herein, that conclusion is firmly established by the evidence in the record below and by Petitioners' own admissions. Moreover, the vast majority of federal court decisions has approved the use of these tests for detecting illegal drug use, and many independent scientific studies have confirmed the accuracy and reliability of these techniques, especially when used in combination.

The Customs Service program also includes a number of procedural safeguards to ensure that a positive drug test report will not result in an adverse personnel decision until after the employee has been given ample opportunity to explain the presence of drugs in his urine. For example, the employee may identify any medications he has taken within 30 days prior to the test. He may also provide other legitimate reasons for having been exposed to illicit drugs. Finally, he has the opportunity to have his original urine specimen re-tested by an independent laboratory of his choice. Therefore, employees are assured that the Customs Service will take action only after considering all available pertinent information.

The drug test reports thus provide vital information to the Customs Service: detection of illegal drug use among those employees who may be chosen to fill sensitive senior positions.

ARGUMENT

THE DRUG TESTING TECHNOLOGY USED IN THE CUSTOMS SERVICE PROGRAM, WHEN COUPLED WITH THE OTHER PROCEDURAL SAFEGUARDS EMPLOYED BY THE CUSTOMS SERVICE, IS AN EFFECTIVE MEANS OF DETECTING ILLEGAL DRUG USE.

1. Federal Courts Have Found the Combined Use of Two Independent Testing Methodologies, Each Based on a Separate Scientifically Valid Procedure, Provides a Highly Accurate Test for the Presence of Drugs.

The combined use of the initial EMIT tests and the GC/MS confirmatory test has been widely recognized by the federal courts as an absolutely accurate and reliable procedure for detecting the presence of illegal drugs in urine.[19] *See, e.g.,*

[19] The legal standard for admissibility of scientific evidence was established in the landmark case of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923): whether a scientific principle or discovery is "sufficiently established to have gained general acceptance in the particular field in which it belongs." In accordance with that principle and Federal Rule of Evidence 201, PharmChem and Syva respectfully request the Court to take judicial notice of the scientific monograph issued by the National Institute on Drug Abuse (NIDA), Research Monograph 73, *Urine Testing for Drugs of Abuse* (1986). NIDA is the agency within the U.S. Department of Health and Human Services which has supported "major research efforts to develop analytical methods for detecting and measuring drugs in biological fluids, with special emphasis on methods for cannabinoids and other abuse drugs." *Id.* at vi. The monograph discusses, *inter alia*, urinalysis testing generally, proficiency and quality control programs, chain of custody techniques, analytical methods, accuracy and interpretation, and specific types of drug assays. These *amici* submit that this publication represents the scientific

(footnote continued on following page)

Lovvorn v. City of Chattanooga, No. 86-6281 (6th Cir. May 23, 1988) (LEXIS Genfed library, Dist file); *Rushton v. Nebraska Public Power District*, 653 F. Supp. 1510 (D. Neb. 1987), *aff'd*, No. 87-1441 (8th Cir. April 14, 1988) (LEXIS, Genfed library, Dist file); *Taylor v. O'Grady*, 669 F. Supp. 1422, 1430 (N.D. Ill. 1987); *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R.*, 802 F.2d 1016, 1019 (8th Cir. 1986).

In *Lovvorn v. City of Chattanooga*, No. 86-6281 (6th Cir. May 23, 1988) (LEXIS Genfed library, Dist file at 6), the Sixth Circuit Court of Appeals noted that positive EMIT test results confirmed by GC/MS "are virtually 100% accurate." *See also Taylor v. O'Grady*, 669 F. Supp. at 1430 ["the EMIT/GCMS chemical analysis procedure, is a highly accurate and reliable procedure for detecting the presence of metabolites of cocaine, marijuana and heroin or opiates in a sample of urine .... [C]ourts have uniformly approved EMIT and GCMS tests as accurate and reliable predictors of these metabolites."].

In *Rushton v. Nebraska Public Power District*, 653 F. Supp. at 1525, the court found that "the EMIT procedure utilized in conjunction with such confirmatory tests as gas chromatography/mass spectrometry is accurate and reliable." In addition to affirming the District Court's decision in *Rushton*, the Eighth Circuit has also written that GC/MS "is considered to be the most accurate [testing procedure] available." *See also Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R.*, 802 F.2d at 1019. The Court of Appeals for the Federal Circuit has reached the same conclusion. *See Williams v. Secretary of Navy*, 787 F.2d 552, 555 (Fed. Cir. 1986) ["the GC/MS test is generally considered the most accurate test available to the scientific community."].

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community's "general acceptance" of urinalysis drug testing. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *See also* Hoyt, Finnegan, Nee, Shults & Butler, *Drug Testing in the Workplace—Are Methods Legally Defensible?*, 258 J. AM. MED. A. 504 (1987), where the EMIT and GC/MS multiple procedure test methods were rated fully defensible against legal challenge in a survey of technical experts, arbitrators and testing laboratories.

Other courts have also found that the combined use of EMIT and GC/MS testing produces extremely accurate results. In *American Federation of Government Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986) (later transferred for consolidation with *National Federation of Federal Employees v. Carlucci*, 680 F. Supp. 416 (D.D.C. 1988)), the court reviewed the Department of Defense drug testing program utilizing the two procedures, and found that a positive EMIT test confirmed by GC/MS "is virtually 100% accurate, assuming that proper chain of custody procedures are followed." *Id.* at 729.

These decisions reflect a virtually universal acceptance by the federal courts of confirmed urinalyses. Indeed, with the sole exception of the District Court's *sua sponte* ruling below regarding the reliability and accuracy of drug testing technologies (Pet. App. 57a-58a), *amici* PharmChem and Syva are unaware of any other federal court decision questioning the validity of such combined scientific procedures to determine the presence of drugs or drug metabolites in urine. Significantly, Petitioners did not seek to defend this portion of the District Court's ruling below in their brief to the Fifth Circuit Court of Appeals, and the Fifth Circuit Court of Appeals expressly reversed the District Court on that issue and upheld the accuracy and reliability of the Customs Service drug testing program. Pet. App. 21a. Nor, except indirectly, have Petitioners in the proceedings before this Court sought to challenge either the Fifth Circuit or any other court decisions regarding the accuracy and reliability of the drug testing technologies used by the Customs Service.

II. The EMIT Immunoassays Are Effective And Accurate.

Numerous scientific studies have established the accuracy and reliability of the EMIT immunoassays used for the initial testing of urine samples in the Customs Service drug testing program. In 15 independent studies[14] involving the confirmation of initial EMIT tests by various analytical methods, a total of 27,059 samples were initially tested using the EMIT

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[14] For the convenience of the Court, Appendix B sets forth a list of these 15 articles, which have been assembled from leading scientific journals in clinical chemistry, forensic toxicology and pathology.

assays and 2,883 (10.6%) produced positive results. Of those positive EMIT test results, all but 51 were confirmed positive by another confirmation method, for an accuracy rate of greater than 98.2%. Notably, those studies were conducted several years ago using earlier versions of the EMIT assays and less developed confirmation methodologies.[15] It is reasonable to expect that if similar studies were to be performed and reported in the scientific literature today, the accuracy rates of the EMIT tests, standing alone, would be even higher than the already impressive reported 98+% score.

One federal court recently appointed the independent American Association of Bioanalysts (AAB) to conduct a study of the reliability of the EMIT tests, and the results confirm the findings reported in the scientific literature. *Peranzo v. Coughlin*, 675 F. Supp. 102, 103-104 (S.D.N.Y. 1987). In *Peranzo*, the court noted the AAB performed several thousand proficiency tests and found that EMIT tests "have an accuracy rate of over 99.7% if one considers all 3,067 [proficiency] tests, or of 98.7% if one considers only the 730 'positive' tests." *Id.* at 104.

Indeed, the EMIT tests are considered so accurate that Dr. Richard L. Hawks, Chief, Research and Technology Branch, National Institute on Drug Abuse (NIDA), expressly recommends that "an effective analytical system for the detection of drugs of abuse in urine should consist of . . . *a sensitive, drug-class-selective technique such as EMIT* or [radioimmunoassay]" for the initial testing procedure. NIDA Research Monograph 73, *supra*, at 38 (emphasis added).

PharmChem and Syva submit that such court decisions and scientific studies fully validate the Customs Service's selection of EMIT as the initial test in its urinalysis program. Even standing alone, EMIT assays produce confirmable findings of drug usage that are well within the bounds of acceptable

[15] Syva has made numerous improvements in all of its EMIT assays since their original introduction, and innovations to improve their sensitivity and selectivity for the detection of drugs of abuse continue to be made. Thus, any references in the scientific literature or case law regarding "the EMIT test" require an understanding that first, there are actually several such tests, one assay per drug or drug class (*e.g.*, marijuana, cocaine, opiates, etc.), and second, each of these tests has undergone significant technical enhancements over time.

accuracy and reliability.[16] Notwithstanding the reliability of the initial EMIT tests, however, the Customs Service has required state-of-the-art GC/MS confirmation of any positive EMIT test result before the laboratory may issue a positive test report to ensure total scientific and forensic credibility for its drug testing program, as discussed in Section III below.

III. The GC/MS Confirmation Test Is the State-Of-The-Art Method for Confirming the Presence of Drug and Drug Metabolites in Urine.

The Customs Service program requires any initial EMIT positive test be subjected to independent confirmation by a second test using a different methodology. Pet. App. 5a. Indeed, Syva, as the manufacturer of the EMIT tests, has long recommended such confirmation to its customers.[17]

Confirmed testing, using two independent testing methodologies, enhances the reliability of the reported re-

[16] Some courts have approved of drug testing programs for supervising prison inmates which do not include confirmation by an alternate method but which only use a second EMIT test to confirm the initial EMIT test result. *See, e.g., Peranzo v. Coughlin*, 608 F. Supp. 1504 (S.D.N.Y. 1985), *summary judgment granted*, 675 F. Supp. 102 (S.D.N.Y. 1987); *Spence v. Farrier*, 807 F.2d 753 (8th Cir. 1986). Furthermore, the Eighth Circuit has approved a drug testing program for the random testing of prison guards where initial positive EMIT test results are confirmed by a second EMIT test. *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987). *But cf. Jones v. McKenzie*, 628 F. Supp. 1500, 1506 (D.D.C. 1986), *rev'd in part, vacated in part*, 833 F.2d 335 (D.C. Cir. 1987) (positive EMIT test without confirmation by an alternate method is insufficient basis for terminating school bus attendant).

[17] Syva's package inserts have for years advised that EMIT test results be confirmed by an alternative scientific method, such as GC/MS. Recently, the FDA has also required that *all* drug test kits include a more specific statement about confirmation. (*See* directive from Kshitij Mohan, Ph.D., Director, Office of Device Evaluation, Center for Devices and Radiological Health, Food and Drug Administration, July 21, 1987 (unpublished).) In accordance with the FDA directive, Syva's package inserts today inform EMIT assay users that the assay:

> . . . provides only a preliminary analytical result. A more specific alternative chemical method must be used to obtain a confirmed analytical result. Gas chromatography/mass spectrometry (GC/MS) is the preferred confirmatory method. Clinical consideration and professional judgment should be applied to any drug of abuse test result, particularly when preliminary positive results are used.

sults.[18] When a drug testing program utilizes two different testing methods, it is extremely unlikely that any "false positive" results will occur. "'[*W*]*ith a double testing procedure, any interfering substance would have to influence both methods to generate a false positive result, and this outcome is extremely unlikely since the two testing methods are based upon completely different scientific principles.*'" *Frankenberry v. Williams*, 677 F. Supp. 793, 800 (M.D. Pa. 1988), quoting Declaration of Dr. Joyce Chang, Director of Toxicology for PharmChem (emphasis added). (The *Frankenberry* court also noted that the reliability of the testing performed by PharmChem was undisputed. *Id.* at 799.)

The confirming test used by the Customs Service, GC/MS, is the "gold standard" of all drug testing methods and is universally recognized as such by all the authorities within the field of forensic toxicology.

> GC/MS is generally considered to be the most conclusive method of confirming the presence of a drug in urine.
>
> • • •
>
> [I]f appropriate methods are used by well-trained analysts, a GC/MS analysis will ensure that a suspected drug is identified properly, and conversely, that no one will be falsely accused of drug use.
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> • • •
>
> While confirmation techniques other than GC/MS may be adequate for some drugs of abuse, GC/MS is generally accepted as a vigorous confirmation technique for *all* drugs, since it provides the best level of confidence in the result.

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[18] "The consensus of the scientific community is that substance-abuse testing is a two-stage process." Members of the Substance-Abuse Testing Committee, Div. of Therapeutic Drug Monitoring and Clinical Toxicology, American Association for Clinical Chemistry, *Critical Issues in Urinalysis of Abused Substances: Report of the Substance-Abuse Testing Committee*, 34 CLIN. CHEMISTRY 605, 610 (1988).

NIDA Research Monograph 73, *supra*, at 35, 36, 38 (emphasis in original).[19]

The evidence Respondent introduced in this case further supports the accuracy and reliability of the GC/MS technique:

> This procedure is recognized as the state-of-the-art method [of drug testing] and when operated properly is scientifically sufficient for making a positive identification of a drug or metabolite. If the GC/MS procedure results in a positive identification of a drug or metabolite in a specimen, it is absolutely accurate.

J.A. 105.

Indeed, even Petitioners' expert toxicologist, Dr. Arthur McBay, acknowledges that GC/MS is an accurate and reliable testing method:

> The particular screening methods chosen and any possible interferences are not important, if the confirmatory method used produces adequate individual characteristics for a 'most probable' identification. There is general agreement in the scientific community that properly conducted GC/MS methods can meet this criteria.
>
> • • •
>
> Mass spectrometry (MS) is used in the procedure generally accepted by the scientific community for the confirmed identification of analytes .... *The combination of a positive immunoassay and a GC/MS result* with the proper retention times and three mass ions of the proper intensities *should distinguish the compound of interest from more than 10*[6] [*one million*] *other organic compounds.*

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[19] A recent report by experts in the field of clinical toxicology states that "GC/MS is a powerful analytical tool for definitive confirmation of positive results", and "GC/MS is the most reliable and is the preferred confirmation method." *See* Members of the Substance-Abuse Testing Committee, 34 CLIN. CHEMISTRY, *supra*, at 613, 622.

McBay, *Drug-Analysis Technology—Pitfalls and Problems of Drug Testing*, 33 CLIN. CHEMISTRY 33B, 35B-39B (1987) (emphasis added).[20]

Petitioners now concede to this Court that "[t]he GC/MS technique is considered by toxicologists to be capable of reliably detecting the presence of specified drugs in a urine sample when it is properly conducted." Petitioners' Brief at 9. Thus, all parties agree that GC/MS provides a highly accurate test for the presence of drugs, assuming proper handling, storage and testing techniques. Pet. App. 5a.

That the combination of the EMIT test and GC/MS confirmatory test is universally accepted as the most reliable confirmed testing procedure is further evidenced by the U.S. Department of Health and Human Services' (DHHS) recent promulgation of its Mandatory Guidelines for Federal Workplace Drug Testing Programs. 53 Fed. Reg. 11,970-89 (1988). The regulations require that the initial test use an immunoassay (*e.g.*, EMIT) and that all specimens identified as positive be confirmed using GC/MS techniques. *Id.* at 11,983. In addition, the chain-of-custody and quality assurance procedures prescribed by the regulations are virtually identical to those followed in the Customs Service program. *Id.* at 11,984-85; *cf.* J.A. 30-32.

As demonstrated above, the critical central feature of the drug testing program specified by the Customs Directive is that no sample may be reported as positive for any drug or drug metabolite unless that sample produces *both* a positive EMIT test and a positive independent confirmation test by GC/MS. J.A. 32. Criticism of either method alone is legally and scientifically unpersuasive; as far as these *amici* are aware, no article or report within the literature of clinical or forensic toxicology, and no court decision (other than the District Court below), has ever challenged the reliability of these two test technologies used *in sequence*, and where a positive report is rendered only

[20] In his article Dr. McBay also addresses the admissibility of urine drug-testing results in court proceedings and opines that mass-spectrometry methods should be acceptable under either the *Frye* standard (*See Frye v. United States*, 293 F.1013 (D.C. Cir. 1923)) or the Federal Rules of Evidence (Fed. R. Evid. 401, 403, 702). *Id.* at 36B.

after the laboratory obtains separate positive results from *both* technologies.

IV. Criticisms of The EMIT Immunoassays And Other Tests Are Unwarranted And Unfounded.

Perhaps because the EMIT tests for drugs of abuse have been more widely used over a longer period of time than any other commercial drug test, Petitioners and other critics of drug testing have challenged their use by innuendo, incomplete statements of fact and, very often, by outdated information regarding the performance capabilities of these assays. *See, e.g.*, Petitioners' Brief at 4, n. 5; *amicus curiae* brief of American Civil Liberties Union at 24, n. 33. Neither PharmChem nor Syva was consulted by the Government in preparing the District Court trial record below, and neither *amicus* was able to participate in the development of the evidence submitted to the District Court. Such unfounded and unwarranted criticisms of EMIT immunoassays could therefore leave this Court with a misleading impression concerning their accuracy and reliability, even though a plethora of readily available scientific literature proves otherwise, as noted in the preceding section and in Appendix B hereto.

Every criticism of the EMIT test that has been raised by Petitioners and other critics can be refuted. Indeed, as shown below, Petitioners' lead scientific expert, Dr. Arthur McBay, published a major scientific paper more than one year ago in which he substantially recanted many of the criticisms he lodged against the EMIT immunoassays in his declaration to the District Court below. Dr. McBay has conceded that confirmed urinalysis testing, combining the EMIT tests with GC/MS confirmation, produces entirely credible evidence that can be and should be accepted by the federal courts. *See* McBay, *supra*, at 33B.

A. Cross-Reactivity and Interference.

Petitioners have alleged that the EMIT immunoassays used in the Customs Service program "cross-react" with legal drugs or other substances to produce false positive results.

Petitioners' Brief at 4, n. 5. This criticism is unjustified with respect to the allegation that certain non-steroidal anti-inflammatory drugs such as ibuprofen, fenoprofen or naproxen cross-react with several of the EMIT assays. The current generation of EMIT assays marketed by Syva and used in the Customs Service program does not produce such cross-reactivity and thus does not generate this sort of "false positive" result. Dr. McBay, Petitioners' chief expert witness in the proceedings below, now concedes that "[t]he manufacturer of these tests [Syva] has since changed the assays and claims that this [cross-reactivity] is no longer a problem." McBay, *supra*, at 35B. Dr. McBay also acknowledges that cross-reactivity "should not be a problem when adequate confirmatory tests are used[.]" *Id.*

There is also a phenomenon known as "interference," in which a substance other than the targeted drug will interfere with the proper functioning of the assay and yield an erroneous positive when that drug is not actually present. It has been alleged in this case that the EMIT assays for drugs of abuse reacted with certain enzymes such as lysozyme, which can be present in human urine. *See, e.g.*, J.A. 64. For at least the past five years, no EMIT test has been affected by any interference from lysozyme following Syva's reformulation of the tests.[21]

B. "Passive Inhalation" of Marijuana Smoke.

Critics have also charged that the EMIT 20 ng/mL immunoassay[22] for cannabinoids may yield a positive test result in a so-called "passive inhalation" situation (*i.e.* where an individual who did not smoke or use marijuana nonetheless inhaled enough marijuana smoke from others in close proximity to trigger a positive EMIT test result).[23] Such charges

[21] Even prior to Syva's reformulation of its assays to eliminate the potential for the lysozyme problem, Syva's recommended procedures controlled for this kind of interference.

[22] The EMIT assay for cannabinoids marketed by Syva has two versions. One has a low (20 ng/mL) cut-off calibrator, which may pick up, at least in theory, persons who are "passive inhalers." The other version has a higher (100 ng/mL) cut-off calibrator, which can reasonably eliminate "passive inhalers" with a substantial margin of safety. As explained below, the latter version is the only one used in the Customs Service program.

[23] *See, e.g., Jones v. McKenzie*, 628 F.Supp. 1500, 1503 (D.D.C. 1986), *rev'd in part, vacated in part*, 883 F.2d 335 (D.C. Cir. 1987).

cannot legitimately be levied against the Customs Service program. The likelihood that passive exposure to marijuana smoke would yield a positive EMIT test result is extremely remote. In a recent study, three nonsmoking volunteers were confined to a small (10′ by 10′) room with no windows for one hour, during which time they were exposed to marijuana smoke produced by simultaneous burning of four marijuana cigarettes. Urine samples collected from the volunteers approximately 24 hours after passive exposure to this air had less than 6 ng/mL cannabinoids, a level far below what would be detected by the EMIT 20 ng/mL cannabinoid assay. Mulé, Lomax & Gross, *Active and Realistic Passive Marijuana Exposure Tested by Three Immunoassays and GC/MS in Urine*, 12 J. ANAL. TOXICOL. 113 (1988). Indeed, the only passive inhalation positives (which are true analytical positives) that have been reported on the basis of in-laboratory clinical experience were the result of highly extreme and unusual concentrations of marijuana smoke in tightly confined and unventilated spaces, conditions which do not resemble any realistic situation.[24]

Moreover, it is scientifically possible to distinguish between actual smokers and passive inhalers by using the EMIT assay with the higher "cut-off calibrator." (*See* note 21 and accompanying text, *supra*.) Indeed, the Customs Service drug testing program specifies the use of the 100 ng/mL cut-off calibrator version of the EMIT cannabinoid assay. J.A. 41. The 100 ng/mL was designated to preclude the possibility of passive inhalation positives. Because of the inherent margin of safety afforded by this higher cut-off level, it is highly unlikely that passive inhalation will generate a positive EMIT test result.[25]

C. Failure of Detection Due to Abstention From Drug Use.

While some critics have alleged that the EMIT test is so sensitive as to be able to detect passive exposure to marijuana

[24] *See* Cone, Johnson, Darwin & Yousefnejad, *Passive Inhalation of Marijuana Smoke: Urinalysis and Room Air Levels of Delta-9-tetrahydrocannabinol*, 11 J. ANAL. TOXICOL. 89 (1987).

[25] In addition, of course, a positive EMIT test result is subject to confirmation testing by GC/MS. Also, an applicant can always explain his positive test result to the Customs Service through its fair hearing procedures. J.A. 34.

smoke, Petitioners nevertheless allege that the EMIT test (and, for that matter, any urinalysis methodology) is so *in*sensitive that it cannot detect illegal drug use if an employee abstains from ingestion for a brief time. Petitioners' Brief at 9. In fact, modern urinalysis can detect chronic heavy use of marijuana at above the 100 ng/mL level for an average of at least two weeks following abstention. *See* Ellis, Mann, Judson, Schramm & Tashchian, *Excretion Patterns of Cannabinoid Metabolites After Last Use in a Group of Chronic Users*, 38 CLIN. PHARMACOL. THER. 572 (1985). Therefore, the EMIT test is an extremely sensitive test capable of identifying marijuana users long after abstinence.

D. Failure to Distinguish Legal From Illicit Drug Use.

Petitioners and *amici* supporting Petitioners also argue that drug testing cannot distinguish between the legitimate use of prescribed substances (*e.g.*, codeine) or ingestion of foodstuffs (*e.g.*, poppy seeds) and illegal drug use. Petitioners' Brief at 8; J.A. 64-65; *amicus curiae* brief of American Civil Liberties Union at 24 n. 33. In fact, as discussed in Section VI below, the Customs Service program has recognized this limitation and provides for an interpretation of test results that includes an elaborate review process through which an employee is given a full opportunity to explain a positive test result.

V. The Customs Service Program Uses Proficiency Testing to Ensure Continued Accuracy and Reliability.

The Customs Service program also has an on-going proficiency testing component to ensure that the laboratory performs to the optimal level of the technologies described above. This proficiency testing has long been used by other agencies in the Government. For example, the highly respected Armed Forces Institute of Pathology conducts one such proficiency service for the various uniformed services' testing programs:

> The blind sample program conducted by the DoD [Department of Defense] Drug Detection Quality Control Laboratory at the Armed Forces Institute of Pathology [AFIP] is an example of such a program.

> It involves sending sets of urine samples (36/set) to various submitting activities (military installations) on a weekly basis. The urine samples are coded, included with personnel specimens, and sent to the various drug testing laboratories. The submitting activities return the lists of assigned sample numbers of AFIP which allows cross-referencing the blind proficiency samples. Each drug testing laboratory sends information copies of all its results to AFIP. These results are then compared to the actual blind sample results. The emphasis of the blind sample program is detecting false positives and administrative errors. *There has not been a single false positive result reported by the drug testing laboratories on the negative blind samples in the past several years.* A blind sample program is an effective method for ensuring high quality and identifying problems, if any, in drug testing programs.

J.A. 105-106 (emphasis added).

The most impressive proficiency scores have been achieved by the Department of the Navy, whose drug testing program essentially mirrors that of the Customs Service. "Out of 4.5 million military and civilian samples tested in our labs the last three years [1983-86], [the Navy has] not experienced a single false positive." Staff of House Subcomm. on Civil Service of the Comm. on Post Office and Civil Service, Report on Drug Testing in the Federal Government, at 42 (June 20, 1986). Similarly, the Air Force has reported that "according to our internal and external ... quality control programs, we have never had a false positive using the testing methodologies required." *Id.* The Army has also reported "no false positives with current testing thresholds and GC/MS confirmation." *Id.* These reports are in accord with *amicus* PharmChem's own experience with the U.S. Coast Guard drug testing program.[28]

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[28] PharmChem was the drug testing laboratory for the U.S. Coast Guard from July 1985 to March 1988. During that period, PharmChem tested 139,227 Coast Guard urine specimens using EMIT initial tests and GC/MS confirmation tests in a protocol substantially similar to that prescribed in the Customs Service program at issue here. Among these specimens were 12,961 blind proficiency samples, and PharmChem did not issue a single false positive report on any of them.

VI. Other Procedural Safeguards Are Used to Determine Whether a Positive Test Result Is an Indication of Illegal Drug Use.

Even when forced to concede that the Customs Service's confirmed testing program is technically reliable and accurately reports the presence of drugs in an employee's urine, Petitioners nevertheless urge that the test results standing alone cannot and should not form the basis for an adverse personnel decision because drug tests cannot distinguish between lawful and illicit use of certain controlled substances, and cannot distinguish voluntary from involuntary ingestion of drugs.[27] Petitioners' Brief at 8. Petitioners' statement is true as far as it goes. It is entirely possible, for example, that an employee may have taken a prescription medication containing codeine, one of the drugs in the opiate family, or that he may have eaten a pastry containing a large amount of poppy seeds, a natural source of opiates. Although his drug test might *correctly* read positive for an opiate because the employee did ingest the drug in some form,[28] such a report would not necessarily prove illicit drug use. For that very reason, the Customs Service utilizes a number of procedural safeguards to alleviate such concerns and ensure that adverse personnel actions are *not* taken without the employee first being given an opportunity to explain the presence of the drug detected in his urine.

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[27] Petitioners also contend that the reliability of the drug testing methodologies may be "compromised by the possibility of sample switching, contamination, or errors in analysis[.]" Petitioners' Brief at 9-10. While PharmChem and Syva recognize that the possibility of human error, however slight, may exist, the mere presence of such possibilities does not mandate a halt to the Customs Service program. As described herein, considerable efforts are taken to assure that critical errors will be detected and corrected before any adverse personnel action is taken. Moreover, as the court observed in *Peranzo v. Coughlin*, 608 F.Supp. 1504, 1507 (S.D.N.Y. 1985):

> Obviously, the possibility that any person may unjustly suffer any deprivation because of a fallible scientific procedure is a cause for serious concern . . . . The courts have also recognized, however, that due process is not synonymous with a requirement of scientific exactitude or error-free procedures. *See, Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 [parallel citations omitted] (1979) ('there simply is no constitutional guarantee that all executive decision-making must comply with standards that assure error-free determinations.'); *see also Mackey v. Montrym*, 443 U.S. 1, 13 [parallel citations omitted] (1979) (same).

[28] However, only the drug test for opiates would be positive. The other four tests used by the Customs Service—for cocaine, marijuana, amphetamines, and PCP—would *not* be positive.

At the time the employee gives his urine specimen, he is given a drug screening pre-test form on which he may list any medications he is currently using or has used within the last 30 days. J.A. 28-29. In addition, the employee may list on the form any other legitimate reasons for any exposure to illicit drugs in the preceding 30 days. *Id.* at 29. (As described above, the form is sealed in an envelope that is not opened unless the confirmed urine test is positive. *Id.* at 31.) In reviewing the Customs Service's procedures, the Fifth Circuit recognized the utility of making such inquiries of the employees to be tested: "[t]he purpose of the questions is to discover information that will explain why a particular positive test does not reflect [illicit] drug use and therefore [to] permit the Customs Service to transfer the employee." Pet. App. 20a.

If a positive test report is received, the pre-test form is examined to determine whether the positive result might have been caused by one of the medications the employee listed or by the indicated legitimate contact with illegal drugs. J.A. 34. If the information on the employee's form is sufficient to establish a causal link to the positive report, the employee is notified that a negative report will be recorded. J.A. 33. If the information on the pre-test form is insufficient to conclusively establish such a causal connection, the employee is requested in writing to provide further information within five working days. The request specifically refers to prescription data and/or a letter from the employee's physician as acceptable evidence in this regard. *Id.* at 34. An evaluation is then made by the Customs Service officials, with assistance from technical experts, of all the information provided in connection with the ingestion of prescription drugs and/or legitimate contact with illegal substances to interpret the test results. *Id.*

The employee is notified in writing of all such interpretations and, as explained above, he is given an opportunity to have the original specimen re-tested by an independent laboratory of his choice. *Id.* at 34-35. To facilitate the independent confirmation testing requested by the employee, and to preserve evidence of the Customs Service's laboratory's findings, all urine specimens testing positive are required to be stored. The positive samples are retained in a frozen state until

the Customs Service Drug Screening Coordinator directs that they be destroyed. *Id.* at 32.

All of the above evidence, as well as any report of an independent laboratory selected by the employee and any other evidence the employee chooses to provide, is then submitted to the Assistant Commissioner of the Customs Service for Internal Affairs for a "suitability determination." *Id.* at 35. No adverse personnel action can be taken until all of the above procedural steps have been followed.

In view of these elaborate procedural safeguards, there is absolutely no basis for Petitioners' purported concern that drug test results alone will form the basis for the Customs Service's personnel decisions or that Customs Service employees will be treated unfairly. The Customs Service's confirmed drug testing procedures and other carefully drawn procedural safeguards ensure that the Customs Service will make the most informed and rational personnel decisions possible.

CONCLUSION

In view of the widespread acceptance of confirmed urinalysis as an accurate and reliable drug testing procedure, as demonstrated by (1) the unanimity of judicial opinions affirming the reliability and accuracy of the EMIT and GC/MS combined testing procedures, (2) the evidence presented in the proceedings below, (3) Petitioners' admission that the drug testing technology employed in the Customs Service program is reliable, (4) the resounding affirmations of the leading toxicologists in this field, (5) the DHHS mandatory guidelines for drug testing in the federal workplace, which are virtually identical to the Customs Service's procedures, and (6) the flawless proficiency scores reported by federal agencies employing confirmed drug testing programs substantially similar to that of the Customs Service, *amici* PharmChem and Syva submit this Court may reach the same conclusion: When properly implemented, the combined EMIT test and GC/MS confirmation procedure provide a highly accurate means to detect the presence of drugs and drug metabolites in urine specimens. When used in conjunction with the other procedural safeguards mandated by the Customs Service, the drug

testing technology employed in the Customs drug testing program provides an effective and reliable means of detecting illegal drug use among employees who may be selected to fill sensitive, senior law enforcement positions.

For all of the reasons set forth above, *amici* PharmChem and Syva respectfully request that the decision of the Fifth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX A

GLOSSARY OF TECHNICAL TERMS IN DRUG TESTING

Calibrators. Test solutions which contain known amounts of drug or drug metabolite. When analyzed, a calibrator will yield a test value, usually in the form of an instrument reading, that is related to the amount of drug in the calibrator. This value is used to standardize the testing instrument.

Chain of Custody. Procedures used to document and account for the forensic integrity of each urine specimen by tracking its handling and testing from the point of collection to the final disposition of the specimen. Chain of custody procedures perform a variety of quality control functions by establishing a series of points at which each specimen must be examined to verify proper handling.

Confirmation Test. An independent test to confirm the presence of a specific drug or drug metabolite indicated by the initial test result. The confirmation test usually uses an analytical procedure based upon a chemical principle that differs from that of the initial test. Federal workplace testing programs have specified the use of gas chromatography/mass spectrometry as the confirmatory test method of choice (53 Fed. Reg. 11,983 (1988)).

Controls. Specimens which contain no drugs or which contain known amounts of specified drug or drug metabolite. The actual contents of these specimens are known to the laboratory analyst. The analyst compares the results of testing the control specimens with their known content to verify that the testing chemicals, instruments, and laboratory techniques are all performing properly.

Cutoff. The dividing line between a positive and negative test result. The lowest amount of drug that will be considered positive is set by an administrative decision of the testing program. This is translated into a laboratory value by measuring the test response produced by a calibrator containing that amount of drug. Urine samples that register above the cutoff are said to be "positive"; those that test below the cutoff are considered "negative." "Negative" in this context does *not*

mean a specimen contains no drugs or drug metabolites but only that nothing was detected at or above the cutoff value.

EMIT Assays. EMIT is a registered trademark of Syva Company. It is applied to an array of assays developed by Syva for the detection of therapeutic drugs and drugs of abuse. EMIT assays are enzyme immunoassays (see discussion under "Immunoassays") and are the most widely used initial test methods for drugs of abuse.

False Negative. A type of error in which the laboratory reports that no drug or drug metabolite is present in a sample which is known to contain a drug or drug metabolite. This term is most readily applied to the testing of proficiency samples (see discussion under "False Positive"). There are two distinct types of false negative error that can occur:

(1) The laboratory test (initial, confirmation, or both) fails to detect a drug or drug metabolite present in an amount in excess of the established test cutoff.

(2) The laboratory test (initial, confirmation, or both) does not report the presence of a drug or drug metabolite that in fact is present but only at a level too low to be detected using the established test cutoff. A low incidence of this type of false negative is usually accepted in testing programs to preclude the occurrence of a Type 1 false positive error (see discussion under "False Positive").

False Positive. A type of error in which the laboratory reports the presence of a drug which is known not to be present in the sample. The use of this term is often inappropriate when testing actual client samples, since the content of those samples is generally not known in advance of testing. This term can be more correctly applied to the evaluation of proficiency test results, since the content of proficiency samples is known prior to testing. Using proficiency test samples as a model, there are two distinct types of false positive error that can occur:

(1) The sample contains no drug at all, and the laboratory test (initial, confirmation, or both) indicates that a drug is present.

(2) The sample contains one of a group of chemically related drugs, but the confirmatory test misidentifies the drug actually present. An example might be a sample which contains only codeine, giving a correctly positive initial test result for opiates, but which during the confirmation procedure is identified as containing the related opiate morphine rather than codeine.

Gas Chromatography/Mass Spectrometry (GC/MS). A testing method that combines two independent analytical technologies. Gas chromatography is used to separate a complex mixture, such as a urine specimen, into components that can be individually measured and identified. The mass spectrometer is then employed to determine the chemical structure of the isolated components by breaking them down into their component fragments (called ions). Because every chemical substance has a unique chemical structure, the identification of a compound by gas chromatography/mass spectrometry is considered conclusive.

Immunoassay. One of a variety of tests that uses an antibody to seek out and detect the presence of a drug or drug metabolite in a urine specimen. The reaction of the antibody with the target drug or drug metabolite produces a signal that can be measured to indicate the amount of drug present. There are several different types of immunoassays in use, which rely upon signals such as changes in radioactivity (radioimmunoassay or RIA), enzyme modulated production of color (enzyme immunoassays or EIA), or the generation of light (fluorescence immunoassays).

Initial Test. A test that rapidly and reliably distinguishes negative specimens from those that may be positive. Federal workplace drug testing programs have specified the use of an immunoassay method as the initial testing procedure (53 Fed. Reg. 11,983 (1988)).

Proficiency Testing. A way of measuring laboratory performance. Specimens which contain either no drugs or known amounts of drug or drug metabolite, but whose actual contents are unknown to the laboratory analysts, are submitted for

testing. The laboratory's test results are compared to the known content of the specimens as an aid to laboratory improvement and/or as a condition of licensure. Proficiency specimens may be introduced as either "open" or "blind." "Open" specimens are known by the laboratory analysts to be proficiency test samples, but their specific content is unknown to the analysts. "Blind" specimens are disguised as normal client samples and are not known to the analysts as proficiency test specimens.

Quality Assurance. The set of procedures designed to monitor and control the accuracy and reliability of drug test results, to identify potential problems, and to resolve any such problems. Drug testing quality assurance should address all aspects of the testing process from specimen collection, through testing and reporting, to final storage of specimens and documentation. This will typically involve such procedures as chain of custody, the use of calibrators and controls, both open and blind proficiency tests in the laboratory, senior-level scientific review of all test data, and long-term frozen storage of positive specimens to permit retesting if necessary.

Unconfirmed Positive. One of the consequences of the use of a two-test (initial and confirmation) drug testing procedure. When the initial test indicates the presence of a drug or drug metabolite, and the confirmation test is unable to detect the presence of the drug or drug metabolite at or above the cutoff level of the confirmation test, the initial test is said to be an "unconfirmed positive."

APPENDIX B

TECHNICAL REFERENCES ON THE ACCURACY OF THE EMIT TESTS

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AMICUS CURIAE

BRIEF

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL TREASURY EMPLOYEES UNION, and
ARGENT ACOSTA, President, Chapter 168,
National Treasury Employees Union,
Petitioners,

v.

WILLIAM VON RAAB, Commissioner,
United States Customs Service,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, NATIONAL FEDERATION OF PARENTS FOR DRUG-FREE YOUTH, and PARENTS' ASSOCIATION TO NEUTRALIZE DRUG & ALCOHOL ABUSE IN SUPPORT OF RESPONDENT

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BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, NATIONAL FEDERATION OF PARENTS FOR DRUG-FREE YOUTH, and PARENTS' ASSOCIATION TO NEUTRALIZE DRUG & ALCOHOL ABUSE IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

The four *amici curiae* [1] who submit this brief on behalf of respondent seek to demonstrate the constitutionality of the Customs Service's drug-testing program. Each *amicus* has a longstanding and direct interest in eradicating drug abuse and is deeply concerned that, if petitioners prevail in this case, the nation's efforts to insure the integrity of the law-enforcement personnel who stand in the vanguard of America's war on drugs will have been dealt a serious and perhaps fatal blow. *Amici* believe that the Fourth Amendment does not compel such a result, and that their experience with and understanding of the issue involved will provide this Court with a helpful, additional perspective for deciding this crucial case.

The Washington Legal Foundation submits this brief with the written consent of both parties.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt by reference the statement of the case set forth by respondent. *Amici* would, however, like to highlight certain aspects of the societal context in which this case arises.

This case emerges against a backdrop of what can only be described as this nation's full-scale "war" on drugs. For that is precisely what the American public finds itself engaged in today: not in sporadic battles against isolated pockets of drug abuse, but in an all-out offensive

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[1] A description of each *amicus* organization is set forth in the Appendix.

waged at every level of society. Indeed, the court below, in upholding the Customs Service's drug-testing program, recognized as much in the very first paragraph of its opinion. See *National Treasury Employees Union (NTEU) v. von Raab*, 816 F.2d 170, 172 (5th Cir. 1987).[2]

Just this year, the General Accounting Office issued a report ("Controlling Drug Abuse: A Status Report") documenting that cocaine and other illegal drugs are costing this country tens of billions of dollars annually in lost wages, law enforcement expenses, and treatment. According to this report, by 1983, the latest year for which figures are available, the cost had risen to $60 billion, with cocaine "the widely abused drug of greatest concern." By 1985, the number of Americans who had used cocaine reached 22.2 million. Between 1982 and

[2] In an effort to wrench the Customs Service's drug-testing program from the context in which it arose, *i.e.*, a society plagued by drug abuse, petitioners declare that "[i]t is obviously inappropriate to resort to national statistics to establish a justification for searching a particular group," such as Customs employees (Petitioners' Brief, hereinafter "P.B.," at 44-45 n.37). In so arguing, petitioners simply ignore the fact that Customs employees are part of the very society to which those statistics apply. It blinks reality to assume that Customs employees are somehow immune to the drug-related influences to which they and their children, neighbors, and communities are exposed. If anything, Customs employees—precisely because they are in the vanguard of the war on drugs—are subjected even more heavily than most to such influences.

Petitioners also claim—in a footnote—that the drug problem in this country is overstated, *i.e.*, that "for the most part, the number of [drug] users is declining." *Id.* Suffice it to say that this claim is belied by the ever rising quantities of drugs seized by Customs employees (*see infra*).

In short, petitioners urge this Court to reject what they characterize as "an assortment of largely meaningless statistics concerning the extent of drug use in society" (P.B. at 44-45 n.37). *Amici* respectfully submit that this Court should instead reject petitioners' cavalier dismissal of the destroyed human lives that such "meaningless statistics" represent, statistics that—as will be shown *infra*—society regards as quite meaningful indeed.

1985, the number of Americans over age 12 who were current users increased 38 percent, from 4.2 million to 5.8 million. The number of cocaine-related emergencies reported by hospitals jumped 167 percent from 1983 to 1986; the number of cocaine-related deaths in the same period rose 124 percent, the upward trend continuing in the first six months of 1987. As for marijuana, about 62 million people over age 12 have used it at least once, as compared with 56 million in 1982. According to Rep. Charles Rangel (D.-N.Y.), chairman of the House Select Committee on Narcotics Abuse and Control, Americans spent about $140 billion last year to buy 178 tons of cocaine, 12 tons of heroin, and 60,000 tons of marijuana. "GAO Cites Cost of Drug Use in U.S.," *The Washington Post*, March 2, 1988.

Indeed, drug use in America has reached such epidemic proportions that the federal government has launched massive efforts to tackle the problem. President Reagan has issued an Executive Order (No. 12,564; September 15, 1986) requiring all federal agencies to adopt programs, including drug-testing programs, to eliminate drug use in the federal workplace itself and by federal workers "on or off duty." 51 Fed. Reg. 32889 (Sept. 17, 1986); 55 U.S.L.W. 2177-78 (Sept. 30, 1986).

For its part, the Senate has voted 93 to 0 for the proposed Anti-Drug Abuse Act of 1988 (S.2205), which would establish a $2.6-billion reserve fund for anti-drug efforts in addition to the $4 billion in anti-drug funding contained elsewhere in the resolution. Among other things, the bill triples the funding of anti-drug grants to states and local governments and authorizes $150 million for federal prison construction to accommodate the increasing number of people convicted of drug-related crimes. Because of the international aspects of drug trafficking, the bill has important foreign policy implications as well; for example, it provides for trade sanctions and cuts in American aid to countries that tolerate or promote drug production and trafficking. *See* "Crim-

inal Justice Newsletter" (PaceCom, Inc.) vol. 19, no. 9 (May 2, 1988) and no. 10 (May 16, 1988); "Drug Enforcement Report" (Pace Publications), vol. IV, no. 13 (April 8, 1988).

In light of its enormous commitment to halting the abuse of illegal drugs in this country, the federal government would be not just remiss but hypocritical were it anything less than rigorous about keeping its own ranks drug-free. The federal government has instituted a program of "Zero Tolerance" for drug use by the public, under which anyone found with even a small amount of drugs risks having his passport lifted or his car forfeited. *See, e.g.*, "Customs Chief Warns Tourists on Illicit Drugs," *The New York Times*, March 3, 1988; "Customs Announces New Drug Crackdown," *The Washington Times*, March 21, 1988. Urinalysis is simply the *public's* "Zero Tolerance" program for drug use by federal employees.

Indeed, the public sector might well take a lesson from the private sector, which has demonstrated increasing willingness to police itself with respect to drug use. A study conducted last year by the U.S. Chamber of Commerce showed that in 1983, only 3 percent of Fortune 500 companies were testing their employees for drug use; by 1986, the figure had skyrocketed to one-third of those companies. *See* "Reagan Drafts Business for Drug War," *The Washington Times*, February 9, 1988. The total number of testing firms should double in 1989, according to a new Gallup survey of 1,118 U.S. companies. *See* "Corporate Drug Testing on the Rise, Survey Says," *The Washington Post*, June 10, 1988. If, as petitioners contend, drug testing of the sort involved here is "a dramatic threat to . . . human dignity and privacy" (P.B. at 24), it is difficult to understand why most Americans have reserved their outrage not for drug testing but for the widespread drug abuse that makes it necessary.[3]

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[3] *See* 53 Fed. Reg. 8368-9 (March 14, 1988) (May-June 1986 national survey by Populous, Inc. of Greenwich, Connecticut and

The need for the public sector to keep pace with the private sector with respect to drug testing is not merely a symbolic one. The Customs Service employees who would be affected by the drug testing program at issue here—*i.e.*, those who actually seize illicit drugs, carry firearms, or have access to classified information—are precisely those whose use of drugs, on or off the job, would have the very practical effect of impairing the integrity of the Service's mission. As the court below noted, the Service "has viewed the interdiction of narcotics smuggling as its top priority and has forbidden its employees to use the very drugs they are employed to intercept." *NTEU v. von Raab*, 816 F.2d at 173. Inasmuch as the Customs Service last year confiscated about 90,000 pounds of cocaine, 640 pounds of heroin, and 1.7 million pounds of marijuana, its ability to carry out its mission cannot reasonably be made to depend on anything less than indisputable proof that its employees are drug-free—a standard of proof that only drug testing can satisfy. *See* "U.S. Pockets Passports of Small-time Drug Users," *The Washington Times*, March 16, 1988.

What all of the above reveals is that the "war" on drugs is not just a metaphor. If any further proof of this fact were necessary, it need only be noted that on May 5, 1988, the U.S. House of Representatives voted 385 to 23 to draft military troops to halt the influx of drugs across our southern border. *See* "House to Military: Enlist in Drug War," *The Washington Times*, May 6, 1988. As one House member observed, "When you're at war, you use the military." *Id.* Prompted by similar concerns, a week later the Senate passed, by a vote of 83 to 6, its own measure for giving the military

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Decision/Making/Information of McLean, Virginia found that 85 percent of respondents favored testing police and other law enforcement agents; an August 6-19, 1986 survey by American Viewpoint, Inc. found that 84 percent of respondents favored testing of police and firefighters, that 80 percent would participate in voluntary testing if asked to do so by their employer, and that 76 percent think the drug crisis serious enough for mandatory testing).

a major new role in stopping the flow of illegal drugs across our borders. *See* "Senate Votes Military Major Role in Drug War," *The Washington Post*, May 14, 1988.

It is against this background of our nation's war on drugs that the constitutionality of Customs' drug-testing program must be assessed.

SUMMARY OF THE ARGUMENT

The need to insure a drug-free workforce is nowhere more crucial than within the federal government itself, since its law-enforcement duties place it in the forefront of our national effort to curb the influx and use of illegal drugs. This is especially true of the United States Customs Service, which has as its top priority the interdiction of these drugs. In accordance with this priority, Customs has forbidden its employees to use the very drugs they are charged with intercepting, and has instituted drug testing as a means of enforcing this policy.

Drug testing is a reasonable fitness-for-duty requirement that will enhance Customs' ability to fulfill its mission, and that will promote public confidence in the integrity of Customs employees. Nevertheless, petitioners would have this Court hold Customs' drug-testing program violative of the Fourth Amendment. *Amici* believe that there is no basis whatsoever for thus constitutionalizing what is essentially an employee grievance over a necessary and reasonable condition for promotion. The Fourth Amendment simply does not require the government, in its capacity as employer, to give its employees a privilege that many private sector employees not only do without, but do without willingly in order to support our country's war on drugs. The American people have a right to insist that their "public servants" do no less.

Customs' drug-testing program involves neither searches nor seizures within the meaning of the Fourth Amendment. Given their justifiable and growing concern over drug abuse and their approval of workplace drug testing for detecting that abuse, the American people are simply

not prepared to regard as reasonable petitioners' claimed exemption from a test of a waste product—a test that, if positive for illegal, unprescribed drugs, constitutes irrefutable proof of unfitness for the sensitive positions that petitioners are seeking.

In any event, Customs' drug-testing program is reasonable under all the circumstances. Common sense tells us that a Customs' employee who uses drugs is more likely than one who does not to succumb to the inducements of the criminal element that he must daily confront—inducements such as bribery, blackmail, and an almost limitless supply of the very drugs he ingests. The Customs Service cannot afford to allow discovery of such a gross breach of the public trust as employee drug abuse to depend solely on background checks or on-the-job observation. Neither one is an adequate means of detecting drug abuse, the effects of which are often insidious, and neither one is a match for the denial and deception skills that are a drug abuser's stock-in-trade.

The American people have a right to insure that their Customs Service is drug-free. Customs' drug-testing program is a legitimate, effective, and constitutional means of exercising that right.

ARGUMENT

The issue in this case is whether the Fourth Amendment prohibits the United States Customs Service from using urinalysis to insure that its employees do not themselves ingest the illegal drugs that they are charged with intercepting. A finding for petitioners would paralyze the federal government's most effective and best conceived response to one of the gravest security threats ever to confront the American people. *Amici* contend that the Fourth Amendment cannot fairly be construed to require such an anomalous result.

The case presents this Court with an opportunity to address the issue left open by *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987), *i.e.*, "the proper Fourth Amendment

analysis for drug and alcohol testing of employees." *Id.* at 1504 n. Both petitioners and respondent have examined in detail the conflicting decisions on this issue by the lower federal courts. Rather than simply duplicate their discussions of these cases, *amici* will expose petitioners' argument for what it is: an untenable attempt to reduce an issue of national security to an issue of job security for federal employees.

Amici will demonstrate that the sense in which petitioners use words such as "privacy" and "dignity" has little to do with the sense in which Fourth Amendment jurisprudence has traditionally understood the right to be "secure" in one's person against "unreasonable" searches and seizures. Characterizing Customs' interest in a drug-free workforce as "abstract" and "unproven" (P.B. at 17, 41, 48), petitioners seek nothing less than a previously unrecognized "right" to use illegal drugs in private and an additional "right" to evade the surest means of detecting that use.[4] Indeed, they demand such rights even at the price of seriously undermining the government's ability to perform one of its highest duties: that of protecting the citizenry from external threats to its physical safety. Illegal drugs indisputably pose such a threat, since with every passing year they take an increasing toll on human lives. One has only to consider the suicides, the violence, the broken families that are the direct result of illegal drug use to know that this is so. Nevertheless, petitioners would have this Court believe that such human wreckage pales in comparison to what they rather breathlessly characterize as the "demeaning, humiliating, and offensive" nature of the simple urine

[4] Although petitioners deny that they are asserting a "right to use illegal drugs off duty" (P.B. at 30), their entire brief implicitly constitutes just such an assertion. Petitioners would confine the government's interest in its employees' off-duty drug use to situations where that use has become "notorious" and "disreputable" (*id.*). Since criminal conduct—especially drug use—is by its very nature usually discrete (*see infra* at 26-28), petitioners are in effect asserting precisely the right they purport to disclaim.

test that would detect the cause of that wreckage. (Petition for Certiorari, hereinafter "P.C.," at 12.) For petitioners, the real threat to society is not drug use but drug testing.

Petitioners in essence characterize the issue here as Big Government *v.* powerless individual. They place themselves, of course, in the latter category, and co-opt for their own purposes the Fourth Amendment terminology that is usually reserved for the just grievances of an oppressed private citizenry rather than for the job-related complaints of federal employees. *See Connick v. Myers*, 103 S.Ct. 1684, 1688 (1983) (referring to "the common-sense realization that government offices could not function if every employment decision became a constitutional matter"). The fact is that petitioners *are* the government vis-à-vis the American people, who are the real party-in-interest represented by respondent and *amici*. Thus, properly understood, respondent's drug-testing program is not an unwarranted extension of government power but a necessary limitation on it. To hold otherwise is to turn the Constitution on its head, by pressing it into the service of a special interest group of government workers who apparently think nothing of undermining the trust and the safety of the "public" whose "servants" they profess to be—the public whose private employers increasingly require the same sort of testing from which petitioners demand an exemption.

The American people have declared war on drugs, not drug testing; indeed, as previously noted (*supra* at 4-5), they regard drug testing as nothing more "than a method designed to detect the presence of a newly emerging threat" to fitness for duty. *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Company*, 802 F.2d 1016, 1024 (8th Cir. 1986). If the Constitution means anything at all, it means that the American people have a right to demand proof of the integrity of the government officials who exercise great power over them. Whether the American people will retain this right is the issue that this Court must now decide.

I. THE CUSTOMS SERVICE'S DRUG-TESTING PROGRAM DOES NOT INVOLVE SEARCHES OR SEIZURES WITHIN THE MEANING OF THE FOURTH AMENDMENT.

If the Customs Service's drug-testing program is, as argued above, actually a restriction on government power over the American people, rather than an exercise of that power, then the Fourth Amendment obviously cannot serve as a basis for invalidating it. However, if this Court holds that, on the facts presented here, the government should be treated as distinct from those who comprise it and who actually exercise its power over those outside government, then this case must be analyzed within the framework of Fourth Amendment jurisprudence. Such an analysis demonstrates that the Service's drug-testing program in no way violates the Fourth Amendment.

Petitioners concede that the Customs Service's interest in hiring and promoting employees who do not use illegal drugs is "unchallenged," "legitimate," "important," and "unexceptionable" (P.B. at 15, 19, 40). Their claim is simply that Customs' need for a drug-free workforce "does not justify the use of illegal searches to accomplish the government's goals" (P.B. at 15). Petitioners, however, have failed to establish that Customs' drug-testing program involves searches at all, let alone illegal ones.

A. Petitioners' Expectations Of Privacy Are Not Reasonable When Assessed, As They Must Be, In The Context Of The Employment Relation.

The Fourth Amendment, which in terms prohibits "unreasonable searches and seizures," "does not protect subjective expectations of privacy that are unreasonable or otherwise 'illegitimate.'" *New Jersey v. T.L.O.*, 105 S.Ct. 733, 741 (1985). *See also California v. Greenwood*, —— U.S.L.W. —— (slip op., no. 86-684 at 4; May 16, 1988). Indeed, conduct does not even amount to a "search"

within the meaning of the Fourth Amendment unless it infringes "an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 104 S.Ct. 1652, 1656 (1984). Nor does conduct constitute a "seizure" for Fourth Amendment purposes unless, with respect to a person, there is a meaningful interference with his liberty [*Terry v. Ohio*, 88 S.Ct. 1868, 1877 (1968)], or, with respect to property, a meaningful interference with a possessory interest in it (*United States v. Jacobsen, supra*). Under these definitions, the Customs Service's drug-testing program works neither a search nor a seizure within the meaning of the Fourth Amendment.[5]

In *O'Connor v. Ortega*, 107 S.Ct. 1492, 1497-1498 (1987), a plurality of this Court held that "the reasonableness of an expectation of privacy . . . differ[s] according to context," and that a public employee's "expectation of privacy must be assessed in the context of the employment relation." [*See also* Scalia, J., concurring in the judgment (*id.* at 1509): "[T]he Fourth Amend-

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[5] Although the weight of authority in the lower courts is to the effect that urinalysis is a "search" under the Fourth Amendment, most of the cases seem to have simply assumed this proposition to be true, with little if any analysis.

The fact that urine is a bodily fluid possesses no more talismanic significance on the "search" issue than did the fact that, in *Wyman v. James*, 91 S.Ct. 381 (1971), the area subjected to official intrusion was a home. In *Wyman*, this Court held that welfare benefits could be conditioned on the recipient's consent to home visits by caseworkers, and that such visits did not constitute "search[es] . . . in the Fourth Amendment meaning of that term" even though they were in a sense "investigative." *Id.* at 386. In so holding, this Court noted that, while concern about Fourth Amendment rights is "an immediate and natural reaction" to cases involving official intrusion into a home, that reaction only begins the inquiry, for " 'the specific content and incidents of this right must be shaped by the context in which it is asserted.' " *Id.* (citing *Terry v. Ohio, supra*, 88 S.Ct. at 1873). Similarly, the personal privacy ordinarily associated with urination does not in and of itself render any third-party involvement with that process a "search" for Fourth Amendment purposes. Context is as crucial here as it was in *Wyman*.

ment may protect an individual's expectation of privacy in one context, even though this expectation may be unreasonable in another."] Thus, contrary to petitioner's contention, the question is not whether there can be any "doubt that, in our society, the act of urinating, and the urine itself, are surrounded by a considerable expectation of privacy" (P.B. at 22). Rather, the question is whether society is prepared to consider reasonable petitioners' claimed exemption from a test of a waste product, a test which—if positive for illegal, unprescribed drugs—constitutes irrefutable proof of unfitness for the sensitive government positions they are voluntarily seeking. The answer to that question, given society's staunch commitment to its war on drugs (*supra* at 3-6), is plainly no, especially since the test has an administrative purpose (as opposed to a criminal investigatory purpose), is conducted in a non-discretionary manner (it applies to everyone seeking a transfer or a promotion to a covered position), is given with notice, is only minimally intrusive, and can be avoided altogether simply by withdrawing the application for the covered position.[6]

[6] As the court below noted, an employee who withdraws his application "may retain his present position, and no adverse inference is drawn from his decision not to pursue his application." *NTEU v. von Raab*, 816 F.2d at 173. Nevertheless, petitioners complain that the court failed to appreciate that, by withdrawing, the employee "is unquestionably sacrificing the promotion *already earned* . . ." (P.C. at 25, 5) (emphasis supplied).

Petitioners do not explain how an employee can be said to have "earned" a position one of the requirements for which he adamantly refuses to fulfill. Presumably, such employees view themselves as entitled to pick and choose those fitness-for-duty requirements with which they will comply. If so, they have arrogated to themselves a right that has never been enjoyed by private sector employees, who at least make no pretense of being public "servants." *Compare Wyman v. James*, 91 S.Ct. at 388 (rejecting notion that welfare recipient who refuses to allow home visits by caseworkers has any right to receive benefits "upon her own informational terms," or "to utilize the Fourth Amendment as a wedge for imposing those terms . . ."). *See also Connick v. Myers*, *supra*, 103 S.Ct. at 1690 (grievances of public employees are not entitled to "a grant of immunity . . . not

Although "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer," the fact is that "[t]he operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official." *O'Connor v. Ortega*, 107 S.Ct. at 1498 (emphasis in original).[7] *See also Mancusi v. DeForte*, 88 S.Ct. 2120, 2124 (1968). Such "operational realities" exist here.

1. *The "Operational Realities" Of The Customs Service Reduce Petitioners' Expectations Of Privacy.*

The court below, quoting from the Directive issued by the Customs Service requiring the drug testing challenged here, noted that Customs employees,

> more than any other federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use . . . as well as [to] illegal substances themselves.

NTEU v. von Raab, 816 F.2d at 173. Because of the contact that Customs employees necessarily have with this criminal element, it is crucial that both the Service and the public be assured of their integrity. It stands to reason that employees in positions that require the

afforded in the [Constitution] to those who do not work for the State").

Petitioners also fail to explain why conditioning a promotion on a drug test should be deemed more onerous than conditioning welfare benefits on home visits, which was upheld in *Wyman v. James*, *supra*. Surely the consequences of non-compliance were much more severe in *Wyman* than they are here. If requiring Mrs. James to choose between the privacy of her home and the necessities of life does not implicate Fourth Amendment concerns, then *a fortiori*, neither does requiring petitioners to choose between a simple urine test and "curtailment of career advancement at Customs" (P.B. at 28 n.).

[7] Even the dissenters in *O'Connor*, 107 S.Ct. at 1508, acknowledged that, "in certain situations, the 'operational realities' of the workplace may remove some expectation of privacy on the part of the employee."

carrying of a firearm or that involve access to drugs or classified information will be targets for bribery, blackmail, and even violence by the drug smugglers who rightly view Customs officials as obstacles to the success of their multibillion-dollar industry.[8] Indeed, Customs Service Commissioner William von Raab has confirmed that Customs employees have frequently been such targets; some have even had to be removed for accepting bribes and committing other integrity violations. Declaration of William von Raab to U.S. Dist. Ct. (E.D. La.) (Nov. 13, 1986) at para. 13.[9]

Thus, a Customs employee assigned to one of the aforementioned sensitive positions is for that very reason a target for drug smugglers. Obviously, he is that much more attractive—and vulnerable—a target if he also uses drugs, even if that use is off-duty and not (yet) addictive. *See* Executive Order 12,564, *supra*, 51 Fed. Reg. at 32889.

Employees who seek direct involvement with drug interdiction are often put in "difficult, dangerous situations where the success of the mission, their own [lives], and the lives of co-workers depend upon their ability to think

[8] According to Francis A. Keating 2d, Assistant Secretary of the Treasury for Enforcement, the latest intelligence estimates of the annual gross revenues for narcotics sales in the United States reach up to $120 billion, with net profits of up to $100 billion. *See* "Vast Flow of Cash Threatens Currency, Banks, and Economies," *The New York Times*, April 4, 1988.

[9] Since the fall of 1986, when Commissioner von Raab issued his Declaration, drug smugglers have intensified their assaults on the integrity of Customs employees. In an article entitled "Enemy Within: Drug Money Is Corrupting the Enforcers," *The New York Times* (April 11, 1988) reported that "[p]erhaps no federal agency has been so stung by drug corruption as the Customs Service. In the last three years, dozens of its employees have been prosecuted or disciplined on corruption charges . . . .

" 'It was painful,' said [Customs' Assistant Commissioner for Internal Affairs William] Green . . . . 'We had thought of ourselves relatively corruption free; before this we had maybe one internal corruption case a year.' "

and react quickly." This ability is dulled by illegal drugs. Von Raab Declaration at para. 11. A drug-using employee who finds himself in such a situation may lack the capacity and even the will to handle himself and others properly. Furthermore, drug use "renders such employees morally unfit for duty, as violation of the law undermines both an agent's ability to enforce the law on a fair and impartial basis and public trust in the integrity of the Service." *Id.*

Employees who seek positions requiring them to carry firearms must be able to make instant life or death decisions; thus, public safety demands that they be drug-free. The public should not have to "bear the risk that public officials authorized to employ deadly force may be suffering from impaired perception and judgment." *Id.* at para. 12.

Employees who seek positions affording access to classified material that is of value to smugglers may be tempted, if they are drug users, to furnish such information in exchange for money to support what is often an extremely expensive indulgence, even if it is a "hobby" and not a habit. *Id.* at 13. As discussed previously (*supra* at 14), the financial incentives can be tremendous.

Thus, the "operational realities" of the Customs Service diminish the privacy expectations of employees who seek assignment to the sensitive positions described above.[10]

[10] *See Rushton v. Nebraska Public Power District*, —— F.2d —— (8th Cir., April 14, 1988) (slip op., no. 87-1441) (upholding urinalysis of employees permitted unescorted access to protected areas of publicly owned nuclear power plant, and finding their privacy expectations significantly diminished by virtue of their work at the plant); *McDonell v. Hunter*, 809 F.2d 1302, 1306 (8th Cir. 1987) (upholding urinalysis of Department of Corrections employees and finding their privacy expectations reduced "based upon their place of employment" and their duty to maintain safety, order, and security of prison); *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*, 107 S.Ct. 577 (1986) (upholding urinalysis of jockeys and finding that pervasive regulation of horse-racing industry reduced their privacy expectations).

2. *The Administrative Purpose Of Customs' Drug-Testing Program Reduces Petitioners' Expectations Of Privacy.*

The "operational realities" of the Customs Service are not the only factors that reduce the privacy expectations of applicants for the covered positions. As the court below found, the Customs Service's drug-testing program "has been adopted solely for an administrative purpose" (*NTEU v. von Raab*, 816 F.2d at 179), *i.e.*, to implement Customs' well-known and well-settled fitness-for-duty requirement that its employees refrain from using illegal drugs (Brief for Appellant von Raab and Memorandum in Support of Motion for Stay Pending Appeal to the Fifth Circuit, at 1-2; P.B. at 2-3). *See also O'Connor v. Ortega*, 107 S.Ct. at 1499 (suggesting that existence of a reasonable regulation or policy discouraging employees from storing personal papers and effects in their desks or file cabinets bears on whether employees have a reasonable expectation of privacy in those desks or file cabinets). While the Fourth Amendment's proscription of unreasonable searches and seizures applies to intrusions made for civil as well as criminal investigatory purposes, "the need for protection against governmental intrusion diminishes if the investigation is neither designed to enforce criminal laws nor likely to be used to bring criminal charges against the person investigated." *Id.*[11] Indeed, the need for such protection is even less where, as here, the drug testing is preceded by notice and is conducted in a non-discretionary manner, and the employees who take it face none of the stigma associated with being "singled out" for special scrutiny, since they are in effect self-selected by virtue of their applications for sensitive positions.

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[11] *See also Ruskton v. Nebraska*, *supra* (upholding urinalysis of nuclear power plant employees where test results were used solely to determine fitness for duty and were not turned over to police); *compare Wyman v. James*, *supra*, 91 S.Ct. at 389 (mandatory home visits to welfare recipients not a "search" *even if* visits "lead to the discovery of fraud and a criminal prosecution should follow").

B. Petitioners Lack A Reasonable Expectation Of Privacy In A Waste Product Expelled In The Performance Of A Normal Bodily Function.

Petitioners' expectations of privacy are further lessened by the fact that urine is a waste product, and as such will inevitably be expelled by the body.[12] Thus, the instant case is thoroughly distinguishable from *Schmerber v. California*, 86 S.Ct. 1826 (1966), upon which petitioners so heavily rely. *Schmerber* involved the extraction and chemical analysis of a motorist's blood to determine its alcohol content. To state as much is to expose the crucial differences between *Schmerber* and the instant case: blood is not a waste product, and in *Schmerber* it was collected by means of an invasive procedure that penetrated the skin—it was not simply expelled during performance of a normal bodily function, such as urination. While petitioners acknowledge these differences (in a footnote), their attempt to minimize them is unavailing. Petitioners simply cannot overcome the fact that essential to this Court's finding of a "search" in *Schmerber* was its concern about "intrusions beyond the body's surface," "intrusions into the human body," and "the issue whether or not to invade another's body." *Id.* at 1835. Unlike the extraction of blood, the discharge or urine cannot fairly be characterized as an "invasion" of or an "incursion" into the body, as petitioners claim (*see, e.g.*, P.B. at 17, 32, 42).

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[12] In considering the government's request for a stay pending appeal to the Fifth Circuit, Judge Patrick E. Higginbotham questioned whether there could even be "an objectively reasonable expectation of privacy in urine, a waste product . . . ." *NTEU v. von Raab*, 808 F.2d 1057, 1061 (5th Cir. 1987)(Higginbotham, J., specially concurring). Indeed, he observed, "It seems odd to think of a government agent as 'seizing' urine by requiring the sample as a condition to consideration for a sensitive job applied for with full notice of the requirement" (*id.* at 1062).

See also Wrightsell v. City of Chicago, 678 F. Supp. 727, 734 (N.D. Ill. 1988)(finding a "minimal interest in already discharged urine") and *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1011 (D.C. App. 1985)(Nebeker, J., concurring).

Since urine is a waste product, petitioners can have no more of a reasonable expectation of privacy in it than they can have in such non-waste products as hair samples [*United States v. Weir*, 657 F.2d 1005 (8th Cir. 1981); *United States v. D'Amico*, 408 F.2d 331 (2d Cir. 1966)], voice exemplars [*United States v. Dionisio*, 93 S.Ct. 764 (1973)], or fingerprints [*Davis v. Mississippi*, 89 S.Ct. 1394 (1969)]. Indeed, petitioners' expectation of privacy in their urine is even less reasonable than the expectation of privacy that the defendants in *California v. Greenwood*, *supra*, had in their trash (another "waste" product). Unlike the unannounced police examination of the trash, the urine here is *not* to be turned over to the police, petitioners are told in advance that testing will be conducted and are notified of the time of collection, and petitioners may avoid both collection and testing altogether by withdrawing their applications for the covered positions.

C. The Procedures For Collecting The Urine Samples Do Not Infringe Any Reasonable Expectation Of Privacy.

As for petitioners' claimed expectations of privacy in the act of urination itself, it must be noted that petitioners do not deny that they are permitted to provide their urine samples in the privacy of a closed bathroom stall after removing outer garments in which a false sample or an adulterating agent might be concealed (P.B. at 5). Petitioners also acknowledge that if they are unable to provide a sample of sufficient quantity at the designated time, they will not be disqualified from receiving the promotion or transfer they are seeking, but will instead be offered fluids to drink; if still unsuccessful, they will be given a chance to return later in the day (P.B. at 6). Petitioners further concede that they are given an opportunity to furnish medical or prescription information that might establish a legitimate reason for the presence of an otherwise illegal drug in their urine (P.B. at 4-5).

Despite the fact that the collection of the urine sample occurs under circumstances barely less private than those one would encounter in a public restroom, petitioners characterize it as "frightening, embarrassing, offensive to personal integrity" (P.B. at 21), and as "a dramatic threat to . . . human dignity" (P.B. at 24).[13] The seriousness of this claim is undercut, however, by the fact that, at the same time that petitioners object to the monitor's remaining "close at hand" during collection, they charge that only "direct observation" will insure the integrity of the sample (P.B. at 20, 5 n.7). In a similar damned-if-you-do, damned-if-you-don't vein, petitioners complain about having to "divulge" (P.B. at 20) information about medications taken within the preceding thirty days, even though the sole and obvious purpose of such disclosures is to protect petitioners from having a positive urinalysis result falsely attributed to illegal activity.

Petitioners are at best inconsistent and at worst disingenuous when they fault Customs' procedures for being, simultaneously, too intrusive and not intrusive enough. They would have this Court deem every procedure that Customs has instituted to ensure the integrity of urine samples while respecting privacy as a "sword" wielded against their Fourth Amendment rights, although the absence of even one such procedure would no doubt cause petitioners to demand its implementation as a necessary "shield" for those same Fourth Amendment rights. But, despite petitioners' efforts to have it both ways, the fact remains that Customs' drug-testing program simply does not infringe any reasonable expectation of privacy in the act of urination. *See Rushton v. Nebraska Public Power District*, *supra* (slip op. at 9) (where drug-testing pro-

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[13] In *Wyman*, *supra*, 91 S.Ct. at 387 n.8, 388, this Court readily dismissed similar claims about mandatory home visits to welfare recipients, even though the visits were far more intrusive than the monitoring here, inasmuch as they involved " 'questions concerning personal relationships, beliefs, and behavior . . . which are unnecessary for a determination of continuing eligibility.' "

gram "does not require that someone witness the employee urinate," interest in urinating in private is "not burden[ed]") and *Mack v. United States*, 653 F. Supp. 70, 75 (S.D.N.Y. 1986), *aff'd on other grounds*, 814 F.2d 120 (2d Cir. 1987).

D. Petitioners Have Not Established That The Information That Urinalysis Would Reveal Is In Fact Private, Or That, If It Is, It Deserves More Protection Than The Information Contained In One's Trash.

With respect to petitioners' alleged privacy expectations in the information contained in the urine samples (P.B. at 28-29), the first point to be made is that this issue has specifically been addressed in the Final Mandatory Guidelines for Federal Workplace Drug-Testing Programs (subpart B, 2.1(c)], which were issued by the Department of Health and Human Services (HHS) on April 11, 1988 (53 Fed. Reg. 11970, 11975):

> In response to concern that specimens may be misused to test for physiological states other than drug abuse (*e.g.*, pregnancy), a provision has been added to the Final Guidelines to prohibit the specimens collected for urine drug testing from being used for any other types of analysis unless otherwise authorized by law.

There is no basis for this Court to assume that the security provisions of these regulations will be administered improperly. *See Whalen v. Roe*, 97 S.Ct. 869, 877 (1977).

In any event, "[g]iving a urine sample is part of an ordinary physical examination and, whatever interest in 'physiological secrets' in already discharged urine there may be [citations omitted], testing for the presence of certain drugs is a minimal intrusion." *Wrightsell v. City of Chicago*, 678 F. Supp. at 734. Furthermore, as Judge Higginbotham observed below,

> [T]he information gained in tests of urine is not different from that disclosed in medical records, for which consent to examine is a routine part of applications for many sensitive government posts. In short, given the practice of testing and background checks required for so many government jobs, whether any expectations of privacy by these job applicants were objectively reasonable is dubious at best. Certainly, to ride with the cops one ought to expect inquiry, and by the surest means, into whether he is a robber.

NTEU v. von Raab, 808 F.2d at 1061 (Higginbotham, J., specially concurring).[14] Indeed, petitioners acknowledge that "Customs employees are subject to ongoing observation by their supervisors and co-employees, and may be required to undergo a formal background investigation or other inquiry into their qualifications and integrity" (P.B. at 35, 46-47). Surely such checking routinely reveals many of the same "anatomical secrets" that petitioners fear urinalysis will disclose. There can hardly be a reasonable expectation of privacy in information that is not, in fact, private.

Whatever "anatomical secrets" may be "hidden in urine" (P.B. at 28), they cannot possibly be more "private" than the secrets contained in one's trash, in which the defendants in *Greenwood*, *supra*, were held to have had no reasonable expectation of privacy despite the dissenters' unassailable contention that "a single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it," and that a search of trash is in many respects comparable to "a search of the bedroom" (Brennan, J., dissenting, slip op. at 1, 6). If the sacrosanct details of personal life are not entitled to Fourth Amendment protection when contained in trash, then information about medications and preg-

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[14] The government confirms that it routinely conducts such in-depth testing and checking with respect to applicants for federal employment. *See* Brief for Appellant von Raab and Memorandum in Support of Motion for Stay Pending Appeal to the Fifth Circuit, at 17-18, 27.

nancy is, when contained in urine, deserving of less protection still.[15]

In sum, petitioners have failed to show that, in the context of their employment relation with the Customs Service (*O'Connor v. Ortega*, 107 S.Ct. at 1497, 1498), they have an expectation of privacy that society is prepared to accept as objectively reasonable, either in their urine, the "information" it may contain, or the act of urination itself. Because the urinalysis conducted by the Customs Service cannot be said to interfere meaningfully with petitioners' liberty or property, it constitutes neither a search nor a seizure under the Fourth Amendment.

II. IF THE CUSTOMS SERVICE'S DRUG-TESTING PROGRAM INVOLVES SEARCHES OR SEIZURES, THEY ARE REASONABLE UNDER ALL THE CIRCUMSTANCES AND THUS DO NOT VIOLATE THE FOURTH AMENDMENT.

Assuming that the urinalysis conducted by the Customs Service does possess some of the characteristics of a search in the traditional sense, the fact remains that the drug-testing program is reasonable under the Fourth Amendment.

In *O'Connor v. Ortega*, *supra*, 107 S.Ct. at 1502, this Court held that:

> public employer intrusions on the constitutionally protected privacy interests of government employees for . . . investigations of work-related misconduct[] should be judged by the standard of reasonableness under all the circumstances.[16]

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[15] This is especially so given that a search of trash will necessarily be indiscriminate in the sense that it will always reveal more than the particular item sought, while urine will usually reveal only what it is specifically tested for. As previously noted, the HHS Guidelines prohibit the testing of urine for anything other than illegal drugs.

[16] "'[W]hat is reasonable depends on the context within which a search takes place.'" *Id.* at 1499 (quoting *New Jersey v. T.L.O.*, *supra*, 105 S.Ct. at 741). To determine the appropriate standard of reasonableness applicable to searches conducted by a public employer, it is necessary to "balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *O'Connor v. Ortega*, *supra*. For the reasons already discussed in Point IA, *supra*, such a balancing reveals that, whatever minimal expectation of privacy petitioners—"in the context of the employment relation" (*id.* at 1498)—may be said to have in their urine, in the information it contains, or in the act of urination itself is clearly outweighed by the Customs Service's obvious need to insure the integrity of those employees who seek placement in the vanguard of our nation's war on drugs. *See also Arnett v. Kennedy*, 94 S.Ct. 1633, 1651 (1974) (". . . Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs").

This standard requires that "both the inception and the scope of the intrusion . . . be reasonable" (*id.* at 1502-1503). *Amici* respectfully submit that—again for the reasons given in Point IA, *supra*—Customs' drug-testing program amply satisfies this standard of reasonableness. *Amici* will now expose and rebut some of the more questionable assumptions underlying petitioners' argument to the contrary.

A. The Program Was Justified At Its Inception.

Petitioners contend that Customs' drug-testing program violates the Fourth Amendment because it is based on neither an "individualized" nor a "generalized" suspicion that it will reveal the use of illegal drugs (P.B. at 37). Petitioners are wrong: there is no Fourth Amendment violation.

To begin, petitioners ignore the fact that Customs employees are drawn from the larger society, which is plagued by drug abuse at every level. *See supra* at 1-3. *See also Rushton v. Nebraska Public Power District*, *supra*, —— F.2d —— (8th Cir., Apr. 14, 1988) (slip op. no. 87-1441) (use of illegal drugs is "widespread in this country"); *Transportation Workers v. SEPTA*, 678 F.

Supp. 543, 545 (E.D. Pa. 1988) ("The problem of substance abuse is societal").[17]

Furthermore, the fact that an agency-wide problem with drug abuse was not revealed during the few months that Customs' drug-testing program was in effect before this litigation ensued hardly renders the program unconstitutional. In the first place, the very existence of the program probably deterred some drug-using employees from applying for covered positions. Secondly, Customs has an indisputable duty to the public to insure—not just to hope—that its employees refrain from using the very drugs they are charged with intercepting. *See Transportation Workers v. SEPTA*, *id.* at 549 (public transportation workers "cannot reasonably expect" transportation authority "to ignore its responsibility to ensure public confidence in its services").[18]

Nor is the program unconstitutional simply because testing is not based on individualized suspicion. In *United States v. Martinez-Fuerte*, 96 S.Ct. 3074, 3084 (1976), this Court held that while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . [t]he Fourth Amendment imposes no irreducible requirement of such suspicion" (citations omitted). In *O'Connor v. Ortega*, *supra*, 107 S.Ct. at 1503, this Court left open the question of whether individualized suspicion of work-related misconduct is "an

[17] The rising level of drug abuse in society at large is all the more significant in light of the sheer number of employees (about 3,000) that Customs must recruit from that very society to fill its growing needs. These needs stem not only from existing vacancies and anticipated turnover, but also from a Congressional mandate that Customs hire an unprecedented number of new employees for sensitive positions. Von Raab Declaration, *supra*, at 2-3, 7, 10.

[18] In *Transportation Workers v. SEPTA*, *id.*, the court noted that "Although the percentage of employees who chronically abuse . . . drugs may not be large, SEPTA is obligated, legally, ethically, and as a matter of good management, to take steps to reduce the problem to a minimum." The Customs Service has no less an obligation in this regard.

essential element" of the reasonableness-under-all-the-circumstances standard adopted in that case. However, the reasoning behind the Fifth Circuit's resolution of this issue in the negative is both sound and persuasive. *NTEU v. von Raab*, *supra*, 816 F.2d at 179-180.

The Fifth Circuit analogized the Customs Service to those highly-regulated industries that are subject to inspection without a warrant and without any degree of individualized suspicion. Such searches are constitutional when "necessary to accomplishment of the regulatory scheme and when the very existence of the federal regulatory program diminishes the reasonable expectations of privacy of those involved in the industry." *Id.* [citing *Donovan v. Dewey*, 101 S.Ct. 2534 (1981) and *United States v. Biswell*, 92 S.Ct. 1593 (1972)].[19] Those factors exist here.

The second factor has already been discussed in Point I, *supra*. The operational realities of the Customs Service and the administrative purpose of its drug-testing program sharply diminish whatever privacy expectations petitioners may be said to have in their urine, in the information it contains, or in the act of urination.

As for the first factor, the "accomplishment of [Customs'] regulatory scheme" clearly necessitates the use of warrantless searches without a prescribed level of suspicion. Surely, the federal government's interest in maintaining public confidence in the integrity of those who serve on the front lines of its war on drugs is no less than, say, New Jersey's interest in assuring wagerers

[19] *See also Rushton v. Nebraska Public Power District*, *supra* (administrative search exception to warrant requirement is applicable to urinalysis of employees permitted unescorted access at nuclear power plant; individualized suspicion not required, since "the state interest is so great and the private interest so diminished"). *Accord*, *McDonell v. Hunter*, *supra* (upholding random urinalysis of corrections employees; "the institutional interest in prison security is a central one"); *Shoemaker v. Handel*, *supra* (upholding random urinalysis of jockeys; state has "strong interest in assuring the public of the integrity of the . . . horse-racing industry," which interest is triggered by "the public perception, not the known suspicion").

that jockeys are drug-free. It is simply not enough to argue, as petitioners do, that background checks and on-the-job observation give Customs sufficient information "to make reasoned judgments about their characters" and, presumably, about drug use (P.B. at 35-36). As much could be said for nuclear power plant employees, corrections employees, and jockeys (*see supra*, 25 n.19), all of whom have been held properly subjected to urinalysis without individualized suspicion. As the Eighth Circuit observed in *Rushton*, *supra* (slip op. at 8),

> [U]nless the employee were constantly monitored, there is no reason to believe a background check would conclusively rule out drug use. Indeed, such an intrusion might be more offensive than urinalysis.

See also Wyman v. James, *supra*, 91 S.Ct. at 388 (in determining welfare eligibility, government may conduct home visits instead of relying on "secondary sources" such as interviews outside the home, which would not "always assure verification" of eligibility).[20]

[20] Petitioners claim that, without a requirement of individualized suspicion, "many more innocent than guilty employees will be subjected to the search, thereby making the procedure both more intrusive and less effective" (P.B. at 42). This claim is simply illogical: the level of suspicion, if any, has no bearing on whether a search is intrusive—after all, a thorough search of one's body or home is no less intrusive simply because it is based on probable cause. Rather, the level of suspicion bears on the *degree* of intrusiveness permitted; here, individualized suspicion should not be required precisely because the employment relation renders petitioners' reasonable expectations of privacy so minimal in comparison with the compelling nature of Customs' interest in detecting illegal drug use by its employees.

Furthermore, petitioners' objection to the fact that "many more innocent than guilty employees" will be tested is equally applicable to the magnetometer procedures employed at airports—which procedures are clearly constitutional [*see U.S. v. McKennon*, 814 F.2d 1539, 1544-1545 (11th Cir. 1987)] despite the astronomical discrepancy between the number of searches conducted and the number of weapons detected. Since 1973, when the searches were instituted, over 8.5 *billion* persons have been screened and 9.5 *billion* carry-on items have been inspected, resulting in the detection of only 38,600 firearms. *See* Semiannual Report of the Administrator of the

Petitioners' claim that background checks and on-the-job observation should be deemed sufficient to satisfy Customs' interest in a drug-free workforce utterly misperceives the nature of drug abuse itself. As the Eighth Circuit recognized in *Rushton*, *supra* (slip op. at 7), "a drug abuser would do just about anything to avoid detection." This is true both of addicts, who regard drugs as necessary to their very survival, and of those in the earlier stages of drug abuse, for whom the prospect of criminal penalties and of harm to job, home, and family would be a powerful inducement to deny, conceal and deceive to whatever extent necessary to maintain their cover.[21]

Moreover, drug abuse does not always produce obvious physical symptoms, as will the abuse of alcohol, which can be smelled on the breath and might also dramatically affect behavior. *See Transportation Workers v. SEPTA*, *supra*, 678 F. Supp. at 550 (individualized suspicion standard for urinalysis of public transportation workers held "inadequate" because, *inter alia*, "[m]any drugs have delayed, residual, or chronic effects not ascertainable through behavioral observation"). Petitioners' acknowledgment that "requiring probable cause can conceivably result in a failure to detect wrongdoing in some circumstances" (P.B. at 36) is obviously a gross understatement when that "wrongdoing" is drug abuse.[22]

Federal Aviation Administration to Congress on the Effectiveness of the Civil Aviation Security Program, January 1, 1987-June 30, 1987 (November, 1987). Petitioners do not satisfactorily explain why these searches, which are so obviously "ineffective" by their standards, should be deemed constitutional while Customs' drug-testing program should be condemned as "dragnet" (P.B. at 43).

[21] Petitioners unwittingly lend credence to this very point when they suggest that drug users might try to "adulterate" their urine samples with table salt or hand soap, or try to "thwart the test by substituting another's clean urine sample for their own" (P.B. at 5n); *see also* petitioners' reference to "the determined casual drug user" who will temporarily abstain from drugs before urinalysis in an effort "to escape detection" (P.B. at 47n).

[22] Even assuming that background checks and on-the-job observation were less intrusive than and as effective as urinalysis in de-

Thus, Customs' drug-testing program was justified at its inception even in the absence of individualized suspicion. The program is reasonable under the Fourth Amendment, given Customs' compelling duty to insure that its employees do not use illegal drugs, the fact that its employees come from a society in which drug abuse is pervasive, and the fact that drug abuse is not necessarily detectable by background checks and on-the-job observation.

B. The Scope Of The Program Is Reasonably Related To The Objectives Of The Program.

Petitioners claim that the scope of Customs' drug-testing program is not reasonably related to its objective of detecting illegal drug use by employees. Specifically, they argue that the fact that the program requires only a "one-time urine test" and gives five days' notice of the date of the test "dramatically diminishes any value [it] could have in detecting or deterring drug-using employees from attaining covered positions" (P.B. at 42, 47). This argument is without merit.

Once again, petitioners have taken the damned-if-you-do, damned-if-you-don't approach discussed earlier (*supra* at 19-20). It is, to say the least, ironic that petitioners condemn in one breath procedures that they would insist on in another.

Thus, the short answer to petitioners' criticism of the notice and one-time aspects of the program is that Customs could simply eliminate them, and test on an unannounced and regular (perhaps even frequent) basis. *See Shoemaker v. Handel*, *supra*, 795 F.2d at 1143. After all, petitioners claim that the notice afforded by the

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tecting drug use, the Fourth Amendment would not preclude Customs from conducting urinalysis: "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v. Lafayette*, 103 S.Ct. 2605 (1983). *See also Colorado v. Bertine*, 107 S.Ct. 738, 742 (1987) and *Rushton v. Nebraska Public Power District*, *supra* (slip op. at 10).

program "do[es] not particularly enhance its reasonableness" anyway (P.B. at 42).

In any event, petitioners' contention that "virtually anyone who uses illegal drugs can avoid detection by temporary abstinence" during the notice period (P.B. at 46) ignores two important facts, one about drug abuse and the other about drug abusers. Concerning the former, it must be borne in mind that—with respect to marijuana, for example—"Even after seven days, five milligrams from one joint remain in the body." "Drugs in the Workplace" (Business Research Publications, Inc.), vol. II, no. 4 (April, 1988) (speech by DEA Special Agent Hugh Shanahan to the American Society for Industrial Security, March, 1988). Indeed, "[m]arijuana, which is fat soluble, can be detected via its metabolites in urine up to thirty days after use." *Id.* (address by former Assistant Attorney General Richard Willard to the White House Conference for a Drug-Free America, 1988).

Concerning drug abusers, the fact that someone (other than an addict, of course) *can* abstain temporarily from drugs does not necessarily mean that he *will* abstain. There are any number of reasons why a person might take drugs knowing full well that he will soon be required to give a urine sample. He may, for example, believe that he can manipulate the quantity and timing of his drug use so as to avoid a positive test result. He may believe that he will be able to adulterate his sample. Or he may simply be willing to take the risk, perhaps because his drug use has dulled his ability to appreciate that risk.

Assuming *arguendo* that the one-time-only and notice aspects of the program do reduce its detection and deterrent capabilities, that fact would not render it unconstitutional. The government may proceed "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical, Inc.*, 75 S.Ct. 461, 465 (1955). *See also*

Railway Express Agency, Inc. v. New York, 69 S.Ct. 463, 465-6 (1949).

Thus, for all of the above reasons, the scope of Customs' drug-testing program is reasonably related to the objectives of the program.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

DESCRIPTION OF AMICI ORGANIZATIONS

The Washington Legal Foundation (WLF) is a nonprofit, public interest law center based in Washington, D.C. with 120,000 members nationwide. WLF has participated in and devotes a substantial portion of its resources to cases raising Fourth Amendment issues, especially as they bear on efforts to eliminate illicit drug use by employees in both the public and private sectors, by students, and by the public at large. To this end, WLF has appeared as *amicus curiae* in cases before this Court as well as other federal and state courts. *See, e.g., California v. Ciraolo*, 106 S.Ct. 1809 (1986), and *New Jersey v. T.L.O.*, 105 S.Ct. 733 (1985).

WLF is frequently involved in federal administrative proceedings on drug testing. For example, WLF's support of proposed rules providing for drug testing of railroad crewmen was cited by the Federal Railroad Administration in its decision adopting such rules. *See Control of Alcohol and Drug Use in Railroad Operations*, FRA Dkt. No. RSOR-6, Notice No. 7, p. 265 (July 29, 1985). WLF has filed comments and petitions urging the drug testing of employees in certain safety- or law enforcement-related positions in the Federal Aviation Administration, the Coast Guard, the Bureau of Prisons, the Drug Enforcement Administration, and the Department of Justice.

WLF also publishes materials on drug testing, most recently an article entitled "Drug Testing and the Supreme Court: A Preview," by Alan M. Slobodin, Associate General Counsel to the House Judiciary Subcommittee on Civil and Constitutional Rights. Previously, WLF published a monograph by Peter B. Bensinger, former Administrator of the Drug Enforcement Administration, concerning recent developments in the law with respect to employers' responses to drug abuse by employees.

Allied Educational Foundation (AEF) is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education, study, and research in such diverse areas as medicine, industry, economics, history, law, and the arts. On these and other public affairs topics, AEF publishes pamphlets, books, and newsletters, and holds conferences, seminars, and lectures. In its conferences on health and welfare, AEF has dealt specifically with the dangers of drug use.

Amicus National Federation of Parents for Drug-Free Youth (NFP) is a non-profit corporation organized to assist parents and parent groups across the country in educating themselves and their children, as well as teachers and legislators, about drug abuse and the most effective approaches for eradicating it. NFP publishes quarterly newsletters ("Prevention: Parentline" and "Legislative Update") as well as educational materials, and holds national conferences to promote its anti-drug message and goals.

Amicus Parents' Association to Neutralize Drug & Alcohol Abuse (PANDAA) is a non-profit corporation dedicated to combatting substance abuse in the home, school, and community. It disseminates its quarterly newsletter ("PANDAA") to legislators, law enforcement personnel, civic and youth leaders, churches, school counselors and principals, pediatricians, and rehabilitation programs. Through PANDAA Press, it publishes such handbooks as *Kids & Drugs*, *Schools & Drugs*, *and Courts & Drugs*. It provides a confidential telephone service for parents needing help with substance-abusing children, and it maintains a Court Watch Committee to observe the judicial system's handling of drug cases.